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THE
American Law Journal,

Vol. IV. 353

BEING THE FIRST

OF A

NEW SERIES.

STANFORD LAW LIBRARY

BY

JOHN E. HALL. ESQ.

**COUNSELLOR AT LAW, IN THE SUPREME COURT OF THE UNITED
STATES.**

*Seu linguam causa sculis; seu civica jura
Respondere paras.....*

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A SUPPLEMENT, containing an *Abridgment of the Laws of Maryland* for the year 1809, (containing those General Laws which are omitted in Maxcy's Edition) and the Acts of general interest passed in 1810, and the commencement of 1811.

ADVERTISEMENT
TO
THE FIRST VOLUME
OF THE
SECOND SERIES.

THREE years have elapsed since the Editor ventured to submit to the publick the plan of a periodical journal devoted to the science of law. During this term, it has been prosecuted with all the zeal and industry which the editor could bestow upon his task ; and in the course of the three volumes that have been published, although many defects may have offended the eye of expectation, yet all admit that something, not entirely unworthy of attention, has been accomplished. It is in the nature of every performance to appear imperfect to some ; and the editor of a periodical publication, though he insert nothing without careful enquiry and deliberate reflection, is rarely hailed, in his annual career, by the voice of approbation or supported by the assistance of the liberal and the learned. But of this work, it is acknowledged with mingled emotions of pride and gratitude, that the opinions which have been expressed, by the most competent judges of its merits, have conveyed all that could be wished and more than was expected in the most deceitful visions of literary ambition. It is this circumstance which has prevented it from yielding to the uncommonly vexatious obstacles that have opposed its progress : and it is this, which encourages the editor to make one more exertion before he abandons a design, the execution of which, it is universally agreed, would be useful to the profession.

Some alterations will be made in the plan of the Journal, of which it may be proper to apprise its readers and those who may be inclined to patronize it. All those acts of the Congress and of the General Assembly of Maryland which are of publick concern,* shall be inserted in the next number which may be issued subsequent to their dates ; of those which are private

* The Abridgment of the Acts of Congress is deferred for the present, as we understand that a New Edition is preparing for the press. The Laws of Maryland accompany the first number of this volume.

in their nature, no more than the titles will be given. The laws of this State shall be printed so as to correspond with the recent edition by Mr. Maxcy, and paged distinctly, so that they may be separated from the Journal. At proper intervals, distinct title pages and indexes to these two collections, shall be published.

We shall endeavour to procure the laws of every state in the Union, from which such selections shall be made, from time to time, as may enable us, in a few years to exhibit a complete institute of American jurisprudence. The science of legislation is not yet perfectly understood among us; it is still in a crude and imperfect state. But with such a collection before him as we hope to amass, the lawgiver or the judge may accurately survey the progress of our experiments, and it will be in his power to imitate the promising, to adopt what is salutary and reject that which time has demonstrated to be pernicious.

Thus, by comparing the projects of the adventurous with the experience of the wise, the young legislator may early acquire knowledge and the old will find additional motives of adherence to a rule of action, which is not less imperative in legal than in political science. *State super vias antiquas.* Thus might the respective laws of the states become, not only what Spencer says laws should be, like stone tables, plain, steadfast and immoveable,—but they might gradually be moulded so as to be the expository applications of consistent and immutable principles. Such a state of harmony and uniformity, pervading the various members of this vast political body, more than all the cant of hollow patriotism, would brace its fibres and animate its vital functions.

It has been intimated in a contemporary journal, that our plan might be made still more comprehensive, and the reviewer recommends to our attention, "inquiries into the origin of the federal constitution and that of the several states, which would afford us some view of the progress we have made." "Changes" he adds, "more frequent than those of the moon, in the form and the substance of the several governments, were once considered the employment or the sport of visionary politicians, and too many of our politicians were of that class; now, the reverence which the sober and the speculative, equally profess, is almost as great as that which they ought to feel. The discussion of old constitutional questions should fill a part of the volume: and the tracts on the subject should either be reauscitated, or an abstract be supplied."

To this suggestion, we have not been inattentive, but have collected a variety of pamphlets illustrative of our political and legal history, which must always be read with profound interest by the statesman and the lawyer. We had likewise collected some old Latin tracts respecting the civil law and the common law of England, of which we intended to insert copious accounts or faithful translations. In this manner also we proposed to introduce

AMERICAN LAW JOURNAL

5

to the English reader a translation of the celebrated Treatise of Hubner *On the right of searching and seizing neutral vessels*, which we have long since completed : and the *Consolato del Mare* and the Treatise of Emerigon on *Assurance*, which are nearly prepared for the press.

We had further marked out some parts of the works of Sir Leoline Jenkins relating to the laws of nations : a translation of *Forcesque de laudibus legum Angliæ* and some sections of Dr. Duck *de Usu et Auctoritate Juris Civilis Romanorum*.

We mention these things, not for the purpose of exciting expectation ; but simply to show that however the annals of our domestic jurisprudence might fail in the contribution of materials, we should be at no loss. The legal lore of former ages and foreign nations is an abundant treasury, to which the scientific lawyer can always resort for those abstract principles of right which are applicable at all times and in all places.

Each volume will contain at least six hundred pages, exclusive of the Abridgment of the Laws of Maryland, divided into quarterly numbers, the price of each of which will be one dollar and twenty-five cents payable on delivery.

Persons who receive subscription papers are requested to transmit their orders to the publisher, in Baltimore.

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Baltimore, 10th October, 1811.

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XI. and XII. Contain a treatise on the law of war, translated from the Latin of Bynkershoeck, by Peter Stephen Du Ponceau, Esq. Counsellor at Law in the Supreme Court of the United States.

Ne fortior causa possit—Ovid.

THE
AMERICAN LAW JOURNAL.

TENNESSEE.

Mero District, Superior Court of Law, May 1808.

Vincent's Lessee, *versus* Conrad and Others.

EJECTMENT.—Plea, Not Guilty. Whether an entry or location of Land, or any evidence, other than patents or deeds, can be given in evidence in this action, in relation to title not founded in prescription.

[Agreeably to the universally received interpretation of the land law of the State of Tennessee, as evidenced by usage, a location or entry, which is of record, is not required to be specific as to boundary. It is usually descriptive as to some point of beginning, to adjoin the line of some other claim, or to include some known object. Boundaries are not ascertained until an actual survey. And in making this, the Surveyor is directed to run in a square or oblong to the cardinal points, such oblong not exceeding in length twice its breadth: unless in either case, the lines of older claims intervene, when the purveyor shall in such case, bound his survey on the lines of such older claims.]

THE plaintiff read a Grant for a pre-emption in evidence, upon which the Defendant's counsel read an older Grant than the Plaintiff's, for part of the Land covered by it, as exhibited in the Plat of the Surveyor.

No. XIV.

A

Whiteside for Plaintiff, then offered to read a pre-emption entry in support of his Grant, of an earlier date than the Defendant's Grant, in order to over-reach the same.

Grundy for the Defendant, objected to the reading of this entry, upon the principle, that the Plaintiff can only avail himself of it, in a Court of Equity supposing it to be special; he had understood that a practice had prevailed in this State for some years past, by which either party litigant was authorised to give in evidence, not only the Entry, but other equitable circumstances. Surely such a practice is not founded in legal principle, and if it were conceived to be the case, he hoped to have the indulgence of the Court in the arguments he meant to use in support of the objection taken.

He took it to be a clear point, that after the issuing of a Grant, the Entry made no part of the legal Title. It is true, that during the time that Lord Mansfield presided in the Court of King's Bench, there was a strange disposition to enlarge the powers of the Ordinary Courts, beyond their former limits;* among other instances it was perceivable on the ground now under consideration—It was then decided that the equitable interest of the *Cestuy que trust* might be given in evidence in a Court of Law. This doctrine however, seems to have been considered by every Lawyer since Lord Mansfield, as one among the few aberrations from legal principle, in the decisions of that great man. Lord Kenyon, his successor, examined the doctrine elaborately, and pronounced it to be unsound, 2 T. Rep. 697, in the year 1788. This case decides that nothing but the legal title can be given in evidence in a Court of Law. Loughborough and Ellenborough, the immediate successors of Kenyon, by a series of decisions to be found in 7 T. Rep. 3. 49. 8 T. Rep. 2. 121. 1 H. Black 461, and 5 East's Rep. 138-9, and many other cases, establish beyond all kind of controversy, that nothing but the legal title can be received in evidence in Ejectment. Runninton in his Treatise on Ejectment, lays down the Law in the same manner in page 12. 3 Dall. 464 Patterson, Judge.

This is clearly the Law of England—Have our Statutes made any alteration? None that can be discovered: it was so consider-

* See Letters of Junius, No. 41. 91. Sch. and L. f. Rep. 66-7.

ed in North Carolina, where the point occurred under precisely the same Statutes. 1 Hey. Rep. 176-7-8, shows, that the Courts of Law in North Carolina, will not permit any thing to be given in evidence but the Grant. An act which passed the Legislature of that State, in the year 1798, erecting a Court with power to repeal Patents by the Sci. Fa. for fraud practised upon the State, is not in form; but it evinces that, that State considered their ordinary Courts (if not those of Equity) incompetent to the repeal of a Grant. In Virginia, it is the practice not to permit a Grant to be opposed in a Court of Law, by an Entry, or any other equitable matter. The same Law in Kentucky, Sneed's Rep. 237-8.

A Court of Law, if they were disposed, cannot, agreeably to their forms of proceeding, afford relief; after a decision here, the losing Grant still has existence, life, and validity.

This Court cannot divest the right communicated by it; nor make it a nullity. The case now before the Court exemplifies this. A few years ago, Conrad, the Defendant, brought Ejectment against the Plaintiff, Vincent, and recovered—one of Conrad's witnesses since that determination died; the then Defendant Vincent, turned about, and brought an Ejectment against Conrad; in both cases the same titles were in contest; one recovery in Ejectment, is not a bar to another, Runn. Eject. 25.

If we succeed now, we may be obliged to renew the contest, again and again; various success may attend those rencountres, as witnesses on either side, drop into the grave.

It is material, that this question should be well weighed by the Court, and if the present practice is wrong, it ought to be changed. The decisions of the Federal Court certainly will not accord with the present practice, and it is of the first importance that the rules of decision respecting property, should be the same in both Courts. If this Court see that the practice, as it now stands, is not founded in Law, it is their duty to change it. In the case of the *King vs. Whiting*, Holt, C. J. decided an important point of evidence, which was followed for twelve or fifteen years, and then over-ruled, Loft's Gilb. 234-5-6-7. *Malus usus abolendus est.*

The meaning, or construction of all writings, is matter of Law, for the Court, and not of fact for the Jury. In almost every case

questions of Law arise upon the Entry, which must go with the facts to the Jury, by the present practice; the Jury will determine them, as they think proper, without any adequate relief. This is subversive of the first, most natural, and important principles of Law, and reason; *ad questionem juris non respondent juratores*; *ad questionem facti non respondent iudices*, are maxims of the Common Law.

Dickerson on the same side. The practice for several years past, has been, to leave the Entry with all the evidence respecting its locality, and points of Law arising on it, to the Jury. The consequences are known to every gentleman of the Bar—tediousness, and covert introduction of a mass of irrelevant testimony, corresponding with the ordinary prejudices of Juries, such as their strong predilection for old Entries, though perfectly vague, for old Settlers, and unreasonable allowances for the unexplored situation of the country in relation to the specialities of Entries. Beside these strong prejudices, with which we have to contend, it is impossible to get a jury above all exception—some of them, or their friends have cases of their own, to lead them astray.

Much expense would be saved by going into a Court of Chancery where the relief would be final, and conclusive, which cannot be the case in a Court of Law.

By the principles of Law, nothing but the legal title or Grant, can be given in evidence, 5 East 133-9, in notes. What was said yesterday by the Court in the case of Crocket's Lessee vs. White, goes the whole length of deciding this question, in principle. The Court determined in that, an Entry without a Grant could not be received in evidence—If an Entry cannot be received in evidence where there is no Grant, it surely cannot, where there is one. It makes no part of the legal title, in either case. An Entry, or Location, gives a person holding a warrant a preference in procuring a Title to all others. This preference might have been lost, or abandoned. Under the authority of the Laws of North Carolina, which gave rise to these claims, a certain time was given for surveying Entries—If not done within that time, they were lost, unless the Assembly had prolonged the time. Entries may be abandoned, by removing, and making an entry at another place. An

Entry makes no part of the legal title ; if it did, the Grant would recite it in the face of it, which never has been the case. Beside, a Grant without an Entry, would be void under such a supposition, and this has been determined otherwise. Since the practice of referring every thing to the Jury, in a Trial of Ejectment, there has always been a dissension both on the Bench, and at the Bar ; the question never has been at rest. The North Carolina practice rests on the same Statutes, and the Judges there, in a variety of decisions, expressly reject the Entry, or any matter prior to the emanation of the Grant, 1 Hey. 135. 318, 358, 456.

Either the Courts in North Carolina, or here, are wrong, for their practice in this respect, is diametrically opposite.

In Virginia, Kentucky, and every other State, where there is a Court of Chancery, the practice is different from ours.

It is scarcely possible, that the Federal Court will follow our practice ; in justice to citizens of other States they cannot do it, for though the Courts of this State, may be content with a practice which submits Law, as well as fact, to the determination of a Jury, citizens of other States will not agree that their rights shall be launched into a sea of uncertainty, without compass or rudder. In 1 Hey. 359, Judge Williams says, " When a Grant once issues " for a tract of vacant Land, it becomes the only evidence of Title, " and we cannot afterwards look further back than the Grant ; we " must presume all antecedent proceedings to have been regular, " otherwise we should introduce the practice of invalidating " Grants by parol testimony."

Haywood in reply, after stating the case, observed, that it was his intention to show that the eldest Grant was *void* when obtained upon a younger Entry, to the prejudice of an older one, that it was *absolutely void* by the Statute which can be shown in a Court of Law. In England, the Court of Equity had no jurisdiction of the Grants of the King, either those that were *void*, or *voidable* only.

The law side of the Court of Chancery, and other Courts proceeding according to the principles of the Common Law, have exclusively exercised jurisdiction in relation to the grants of the King, either *void* or *voidable*. The Chancellor, sitting in his ordi-

any legal Court, is alone competent to repeal a Grant of the King. 3 Bl. Com. 47. §61. In that Court the proceeding is by Sci. Fa.; and from the judgment of the Chancellor, a Writ of Error lies to the King's Bench. He admitted, that recourse was seldom had to this Court to repeal a Grant by Sci. Fa. as stated, when he has been imposed upon by false suggestions, or misrepresentations. The Court of Chancery in England, proceeding by English Bill, as it is termed, has no jurisdiction in cases of this kind. In this, as well as other States, a Chancery Court has but one mode of proceeding by English Bill, as it is termed in the Books. They have no power to proceed as they do on the petty bag or law side of the Court of Chancery in England, in repealing Grants. If therefore, we recur to the English Authorities, it will clearly appear, that none but a Court of Law in this country, can act upon a *void* Grant. There is no method to repeal a Grant.

The cases in the English Books, which go to show that nothing but the legal title can be given in evidence, in Ejectment, I admit, but shall contend that the Entry is part of this legal title.

The cases referred to, in Heywood, were once considered the Law, in North Carolina, though the whole Bench, nor Bar were ever satisfied with it. Since those decisions the Law has been considered otherwise, as will appear by the case in 2 Hey. 98.

In construing our own Statutes, we have nothing to do with the Reports of cases in other States, on points arising on Statutes peculiar to themselves. In the admission of these decisions, great care ought in all cases to be used. The case in Sneed's Reports does not apply here. The case in 3 Dall. adopts the principle established by the cases read from Term Reports, which is not disputed. The act of North Carolina in the year 1798, 67, for establishing a Court to try Patents, proves that the Court of Equity, had no such power as is contended for here, else why pass the Act? The Act of North Carolina and Tennessee usually termed the compact law, passed by both States in the year 1804, adopts all the entry laws, and laws of North Carolina respecting lands. Those, before the Act of Cessions, (1789) were in force, as being the laws of the Mother State, and expressly adopted in the Cession to Congress. Those on the subject of land since that time, were adopted

by the compact in 1804. Hence then the Act of 1798 for repealing Patents, is in force here.

The second ground, which it is necessary to examine is, that by the Statute law of this Country, a Grant obtained upon a younger entry, to the prejudice of an older entry, is *void* as against such older entry. In order to ascertain whether this be the law, we must consider all the laws passed by the North Carolina before the Cession Act, relative to the appropriation of lands, with those passed since, relative to the appropriation of lands of this Country, over which she retained a power; together with the Acts of this State on the same subject, *in pari materia*; this should be construed together, and where we meet with the same expressions in different Acts on the same subject, they must bear the same meaning. 5 Com. Dg. Tit. Parliament R. 16, 17. Doug. 30.

The first Act passed by North Carolina, respecting the disposition of her vacant lands, was in November, 1777, C. 1. Iredell 292, at a time when there was not any Court of Equity in the State. The 9th, Sect. of that Act, page 294, is in these words "that every "right, title, claim, interest, or property, by any person or persons "set up, or pretended, to any of the before mentioned lands which "shall not be obtained in manner by this Act directed, or by purchase or inheritance, from some person or persons becoming "proprietors by virtue thereof, or which shall be obtained in fraud, "elusion, or evasion, of the provisions and restrictions thereof, shall "be deemed, and are hereby declared *utterly void*." This Act in express terms contemplated void Grants, and how could such Grants be avoided? not in a Court of Equity, for there was none of necessity then in a Court of law. The effect should be attained in a trial by Ejectment. Let us attend to the provisions of subsequent Acts on this subject. In April 1779, 67 Sec. 6. Ind. 368, it is enacted "that where it shall happen that the bounds of two or more entries join or intersect each other, the Surveyor shall, and he is hereby required, to survey such entries in turn, the eldest being first surveyed, provided such entry be not caveated; but when that shall be the case, it shall not be lawful for the Surveyor to survey, either of the entries, &c. until the determination of the Caveat. The Legislature designed by this clause to enable the first enterer

to get his Grant first. The 7th Sec. directs, that all surveys shall be returned within twelve months in order that Grants may issue. Suppose the Surveyor should not survey in the order pointed out by law, and the younger enterer should get his Grant first, would there be no remedy? there surely would. And this remedy must have been in ejectment, there being no other mode. The Act, 1783, C. 2 S. 19 and 20, Ind. 448 is next to be adverted to; the 19 Sec. has these words, "whereas many disputes may arise from the Surveyor's giving preference to warrants of a younger date, and not certifying in the return of survey, the date of the entry, and number of the warrant, under which the same is surveyed, by means whereof Grants have in many instances issued on such returns, contrary to the true intent and meaning of the said Acts, for prevention, &c. the entry takers are directed, to deliver to the Surveyors periodically the warrants upon the several entries not disputed; the Surveyors shall proceed to survey according to number, and date, and shall make return of plats within twelve months, with a view to the emanating of Grants, under the penalty of fifty pounds. The same ideas occur on this section as on that of the 6th. Sec. of the Act of 1779. If the Surveyor does not do his duty, and the younger enterer should get his Grant, how is the elder enterer to be relieved? doubtless in the same manner as contemplated by that section in ejectment. The 3d and 4th, Sec. of the Act concerning the lands of the officers and soldiers 1783, 3d. Ind. 450, shows, that if no objection is made at the time of the location, it shall be good and valid, notwithstanding another person may afterwards set up a claim. We have the eldest location, and how are we to avail ourselves of it, otherwise than in the manner contemplated by the acts of 1777 and 1779. We have no ground to authorise us to believe the Legislature designed any other method, than that contemplated by those acts. But the act of 1786, C. 20. Ind. 589, if well considered, puts this question completely out of dispute. It is "an Act to prevent the obtaining of grants for lands" lying in the western parts of this state, to the prejudice of first enterers, and entered in the office lately established for receiving entries of claims of such lands, by an act, entitled an act for opening the land office for the redemption of specie, and other certi-

itates, and discharging the arrears due to the army." The words of which are as follows, "Whereas it is the intent and meaning of the said act, and of the act hereby revived and put in force, that the first enterer of the vacant and unappropriated lands, if specially located, therein described, shall have preference to all others, in surveying and obtaining grants for the same, when such entries have been made. And, whereas, divers persons have repaired to the parts lying out of the inhabited parts of this state, and have caused the same to be surveyed in virtue of entries made subsequent to the entries for the same lands, and plats of such surveys to be returned to the secretaries office, have, or are about to obtain grants for the same to the prejudice of the first entries. For remedy whereof, Sec. 1. that every first enterer of any tract of land specially located, lying in the western parts of this state, out of the inhabited parts thereof, shall be allowed the term of two years to have the same surveyed; and that all grants and surveys of land lying in the parts aforesaid, heretofore or hereafter to be made or obtained within the said two years by any person upon land previously or first entered by any other person, shall be, and the same are hereby declared, to be *void and utterly of no effect*." It will be recollected that the operative words used *void* and of *no effect* are the same as in the 9th section of the act of 1777; their effect must be the same, as there was then no Court of Equity. The effect of a Grant, must of necessity, have been tried in Ejectment, and so it must be now, for the Legislature have discovered no other disposition. The time for surveying has been prolonged from the passage of that Act, to the present moment, and therefore, no objection can arise upon that ground.

The Act of 1787, c. 23, Ird. 625, is a general law, intended by its caption to operate in the Eastern part of the State of North Carolina; but its provision has no legal limits. It is entitled "An Act to amend the several Acts of Assembly heretofore passed for giving further time to surveyors within the different counties to make their surveys and return plats thereof to the Secretary's office," &c. "Whereas, by misconstruction of the several laws respecting entering and surveying lands in this State, impositions

have been attempted on the original enterer of the said lands, for remedy whereof, Sec. 1, provides the same remedy with the Act of 1786, except limitation of time in making surveys, and declares Grants obtained upon younger entries *void and of no effect*; with the following proviso, "that nothing herein contained shall be construed to prevent any person making a subsequent entry on any land; from surveying and obtaining a Grant as the Law directs for all such surplus land as shall remain after the enterer or enterers of such land, hath surveyed his, her, or their entry or entries as aforesaid."

I will now proceed to examine the objections to this mode of trial, the consequences of changing the practice, and lastly, the British authorities.

It has been objected that this method of trial in Ejectment, is incompetent to afford relief; that different Juries will hold different opinions respecting the law arising in each case, so that decisions will be uncertain and fluctuating. This objection, if it has any weight, proves too much; it is one of which every case is susceptible. No Jury cause can exist without points of Law, as well as fact. In cases of fraud, a Jury can enquire incidentally of all matters. In the view of the Legislature, as expressed in the Acts of 1786-7, the obtaining of an elder Grant to the prejudice of an elder entry, is bottomed on fraud. In Equity, there must be a trial of an issue of fact; so that the consequences of the trial will be the same, as at Law: The Court have only the power to state their opinion of the Law in either Court.

The weight of this question is certainly great, as it respects the practice. For twelve years past*, we find the practice as it now stands. Many cases are now depending in this Court, and if the principle of turning a suitor round to the Court of Equity should obtain, great injustice might be done. They have applied to this Court, under an established practice for justice; and now to turn them out of Court with great and accumulated costs on their shoulders, would be contrary to every idea of law and right. It would be too much for the court to say now, that the practice

* Only ten years.

as existing, was wrong in its commencement. If wrong, nothing less than legislative authority can change it; *communis error facit jus*.

Mr. Haywood then read 2 Rep. 50, 54. 10 Rep. 109. 2 T. Rep. 515. 1 T. Rep. 602; from a full view of which, it appeared that the validity of the Grants of the King, could be enquired into incidentally in Ejectment.

The case put by Mr. Dickerson, is where two Entries are made, and a Grant obtained by the person holding the younger entry; the elder enterer then removes his claim. If, says he, the doctrine we advocate, be correct, the Grant obtained is void, because it was obtained by the prejudice of an older enterer, and though the elder entry is removed, the Grant having been obtained in fraud was void, and nothing can restore its validity.

The elder enterer having removed his claim, cannot claim the land from which it was removed, nor can the younger enterer claim upon his Grant, as being void; the land would be vacant, and the younger enterer remediless, as he could not remove by the Laws of North Carolina, after obtaining a grant.

To this reasoning I oppose the authorities of the Acts of North Carolina, April 1784, c. 14. sec. 7. October 1784, c. 19. sec. 6. 1786, c. 20, s. 7. Ird. 483, 540, and 590. Removals are only authorised where lands have been previously entered.

It is certainly more convenient to try the validity of grants, at Law, than in Equity:—the first is more expeditious and less expensive.

Before dismissing this subject, it is worthy of remark, that the Laws of this State, since it acquired the power of perfecting titles from North Carolina, have carefully preserved the preference of older entries against an elder grant upon a younger entry. Act of 1807, sec. 4, 34, 37 and 38. Upon the principal ground, then, the Laws of North Carolina and Tennessee are consistent, and give validity to the younger grant upon an older entry; declaring the elder grant *void* and of *no effect*, which by the course of practice in England, must be enquired of in this court; and not in Equity, where no power exists to proceed as in the petty bag—our court proceeding by bill only,

Stuart for defendant, enforced the arguments used by Mr. Grundy, and to show that the practice in North Carolina under these statutes, was as contended for, he cited in addition to those before offered 1 Hey. 358. 9. 107. Conformably to the principles of pleading, the grounds upon which it is intended, to avoid a deed or grant ought to be shewn in pleading, and not given in evidence. 5 Co. 119 Whildales case. 7 Ba. Ab. Tit. Void and Voidable.

Whiteside for plaintiff, expatiated at large upon the grounds taken by Mr. Haywood. The practice we now contend for has existed since the year 1796. The question is, whether the jury shall have spread before them, the whole legal title, or not—The cases that had been read by his colleague shewed clearly that the validity of grants might be enquired of in ejectment. As to the policy of the present practice, there is no doubt, that it is attended with far less trouble, expense and delay, than in equity. Besides, the same rule in property, must prevail in equity, though the remedy is different.

The Court of Chancery in England, proceeding by bill, have no power to repeal grants: as between individuals, they can in that court, compel a person holding the legal title, to convey to the person holding an equitable claim to the same property. But should a grantee, apply to a court of equity here, for a conveyance of a better title, an issue must be made up, and tried by a jury; therefore the effect would be the same—it has been urged, that there is no certainty in the decision of juries; so far as my information extends, juries are as often right as courts—A court of equity, as it is termed in our law, or chancery in England, can do nothing more than a court of law.—In some of the states where there is no court of equity they manage business of this kind, as well as if there was such a court.* If a person goes to a court of equity here, he cannot get out again under three years.

The legislature of North Carolina, contemplated an entry, as giving a legal, and not an equitable right, otherwise the 9th section of the act of 1777 would be nugatory, for there was not, at that time, any court of equity.

* Vide 4 Dall. 448.

The reason of the law, in requiring two plats to be returned to the secretary's office, was, that one plat might be filed for the purpose of enabling the secretary to avoid issuing a second grant, for the same piece of land. The act of 1777 Sec. 3, authorised the entering of *vacant* land. That act, as well as those passed subsequent, had no other idea, but that the first enterer would obtain an indefeasable right. Caveats were provided for cases of occupancy. By the act of 1783 S. 19, surveyors are directed to recite the date of the entry, and warrant. This certainly was required in order that it might appear from the grant, who had the oldest entry, of different claimants, and consequently the best title, for the legislature certainly designed that an entry should give a legal right, by providing in so careful a manner against injuries arising from obtaining grants upon younger entries. The judges will now admit an entry to be given in evidence in North Carolina, though it was not the case formerly, which is evincive of the correctness of our practice. Haywood J. in 1 Hey. 497 referring to this point, says "were this *res integra*, I should be of opinion, that such evidence as is now offered ought to be received," and the case in 2 Hey. 98 establishes the principle, that the courts in N. Carolina do receive such evidence.

Where a statute declares an act or deed *void*, it can be shown in a court of law. The cases referred to, by my colleague demonstrate this position.

An entry is matter of record, of which all persons are bound to take notice; and can come into view in ejectment, without pleading, as well as the grant. It is true, as stated by the court in the case of *Crocket's Lessee vs. White*, that an entry without a grant, cannot be received in evidence,—being an inchoate legal right, it may be removed. But an entry is subject by our law, to taxes, to execution, may descend, and may be alienated. Having so many legal attributes; it cannot be otherwise, than considered as a legal, and not an equitable right, to all intents and purposes. An enterer cannot be viewed in the light of a *cestuy que trust*; therefore the cases in Term Reports do not apply. In that case there is a confidence between *cestuy que trust*, and the trustee; here there is none.

The legislature designed by their acts of 1777, and subsequent acts, to make an entry a legal right. A bond gives a right, but it cannot be sold on execution; it is therefore not a legal or vested right, and this goes great length in ascertaining the difference between the two cases.

The first interpretation of the land law in North Carolina was erroneous; the judges latterly being better informed, have displayed more intelligence. We are told, that our decisions will be overhauled by the federal court.* This is an independent court, over the decisions of which, the federal court has no controul. There is a case in 3 Dall. 425 in which it was determined, by the supreme court of the United States, that a complete legal right, might exist without a grant, upon a survey alone. Here we do not contend that an entry communicates a complete legal right, but after the emanation of a grant makes a part of one.

The interests of justice, so imperiously demand that the practice should remain as it is, that I cannot better conclude this argument, than in the language of Mr. Justice M'Kean. "It is essential, to private justice, and to public peace, and order, that the rules of property, as well as of other subjects of society, should be settled and promulged. Wretched indeed is the condition of that people, where the law is either uncertain or unknown." 2 Dall. 98.

Grundy for defendant, concluded the argument, by a full and complete development of the principles stated in the opening of the case.

Campbell J. Previous to the year 1796, or 1797, it seemed to be the understanding of the bar, that the remedy in such a case as the present, was in equity alone; but in a decision which took place at Jonesborough about that time, it was determined such evidence as is now offered might be received in ejectment. In several cases which occurred afterwards the propriety of the decision was questioned; for some time past, until lately, the question seemed to be

* Vide 4. Dall. 358 where the Circuit court of the U. States decided differently from the decisions of the State Court.

at rest. I am perfectly willing it should remain so, though I am inclined to think that I did not concur in it at Jonesborough.*

Let the evidence go to the Jury.

Overton J. The case has been argued at great length, and with much ability on both sides; and if in the opinion now to be offered error should exist, it must be imputed to the want of mental power to perceive amidst so great a mass of legal matter, and argument, on which side the correct principle lies. As the greater part of the argument arises from the English authorities respecting the grants of the king, it seems important that they should be considered in the first place. In no branch of the law of England do we find greater confusion, obscurity, and apparent contradiction, than in the numerous writings of Lord Coke and others, on this subject. The great variety of nice and obscure distinctions, taken in these cases where the king's prerogative was concerned, shows the minds of the judges in England, were in an almost constant state of struggle, between a sense of common justice, and the peculiar rights of the crown. Jenkins in the preface to his reports, when enumerating the abuses of the law, does not omit, "the too great nicety with which the king's patents are construed," and in the case of *Alter Wood*, respecting the king's grants, so elaborately reported 1 Co. 40 and afterwards brought before the twelve judges in the Exchequer, Jenk. Cent. 251 p. 42, it is said "there is a hard case, where the king is not deceived in the consideration, nor in the essence of the estate, and where the king has no perjury, but the prejudice is to the patentee, the king's patent ought not to be avoided. This grant is good in the case of a common person. *Principis beneficium decet esse mansuetum.* It is for the king's honour to maintain his patents, and it is a dishonour to him to avoid them, by too nice and subtle constructions. And frequently it is to the grievous loss of the patentee." I might adopt the language of Mr. Justice Ashurst in delivering the opinion of the court of K. B. in the case of the King *vs* Amery 2 T. Rep. 563 cited at the bar. "It would be needless to go through all the cases which have been cited at the bar, in which there is a great deal of confu-

* The case alluded to was *Rapel's Representatives vs Blair*. Sept. Term, 1798.

sion and contradiction ; and therefore, though we have considered them, we think it better to state the authorities on which we rely, and which seem to us to have the strongest reason on their side." But as the case has consumed much time in its discussion, and is considered important, I will briefly notice some of the books. A patent or grant by the state to a citizen must be considered in the view of an ordinary contract between two individuals. 3 Cranch Rep 1 to 70 by the supreme court of the U. States,* 2 Dall 320 per Patterson J. The assumption of this principle seems to be warranted not only, by the opinion of the supreme court of the U. States, but by the nature of our Republican institutions.

It is the aggregate body of the people, who make a grant, thro' the medium of their public functionaries, the governor and secretary ; and no reason can be perceived, why other principles of law should be attached to such a contract, than those which would result from a similiar one between citizen and citizen. In the latter, the contract is between one man and another ; in the former between a number of individuals on one part, and a single individual on the other. The law is believed to be the same in both : and so far as the authorities produced, accord with this proposition they are conceived to be law here. otherwise not. With this impression a succinct view of the cases will be taken.

In England the kings grants are repealed, or cancelled by the chancellor ; on the law side of the court of chancery, by sci. fa. 3 Bl. 47. 261, and Lord Coke in 4th inst. 88 has given us three cases in which it is ordinarily done. First when the king grants the same thing to different persons, the first patentee shall have sci. fa. to repeal the second. Second, where the king doth grant a thing upon a false suggestion, he, *prorogativa regis* may repeal his own grant Third, When the king doth grant any thing which by law he cannot grant, he *jure regis* and for the advancement of justice and right, may have a Sci. fa. to repeal his own letters patent ; and the judgment is, that the letters patent, and enrollment, shall be cancelled, vacated, annulled and held for naught. It is competent for this court to cancel letters patent. The most emin-

* Same case reported in 4 Dall 398.

ent English lawyers, particularly those learned and eminent common place compilers, Comyns, Bacon, and Viner, have considered the different decisions in their courts, as resulting from the rights of prerogative, which is defined to be that "law in case of the king which is law in no case of the subject" 5 Bac. 486 tit. Prerog. Lond. ed. 1807 ; and, in page 552, we find a great variety of authorities collected under the head, "of the difference in the rules of law as directing the Kings property, otherwise than that of a subject" of the granting of Fairs, Markets, Corporations, &c. they are referable to the 3d division of Lord Coke in 4th. Inst. 88, and to that division in Bac. Ab. to be found under tit. Prerog. F. 1. Though the principles attached to this division of prerog. (where the King acts for the public and not his own interest) are too frequently confounded with those incident to the 2d division ; yet in many respects there are strong marks of discrimination to be found in the books. So much inclined were the Judges in ancient times, to lean towards prerogative, that they borrowed, under the appearance of analogy, principles, from other divisions of the law, and even then made distinctions, too fine for the touch. Bacon in his division of the rights of prerogative proceeds—"of Grants arising from his interest," "of things of a new invention," "of the construction of the King's Grants and letters Patent, as to their being good or void ; and herein of the Kings being deceived in his Grant"—Under this head which is clearly referable to the 2d division of Lord Coke in 4 Inst. we find "as the King's Grants proceed chiefly from his own bounty, and his letters patent are Records of a high nature, they ought to be construed most favourably for the king, contrary to the grants of common persons," &c. and accordingly in a great variety of cases established upon subtle distinctions, we find the King's Grants declared *void* on account of his having been *deceived* in his Grant. The book then proceeds to enumerate some of the cases, and point out some rules for ascertaining when the King might be said to be *deceived* in his Grants. To point them all out with their contradictions, either real or apparent, would be a difficult task. All these rules however, have arisen from cases concerning *the King's own interest*,

and with a view to his *prerogative*, where the law in many instances is different from that which would govern the contracts of individuals, as has been shown, and may be further seen in 10 Co. 113b. 11. Co. 87A. In the first of which, it is admitted that a common person cannot avoid his Grant, made upon false suggestions, as the King can *jure regis*. Under the same second division of Lord Coke, we find that if by misinformation, or false suggestion respecting his Estate, the King is *deceived* as to the legality of his Grant in part, it shall be *void* for the whole, but otherwise as to a common person 1. Co. 36. 10 Co. 113b. 3. T. R 537. 17. Vin. 80.

Out of this heterogenous mass of matter furnished by the English decisions, respecting the King's Patents, Mr. Justice Grose, in the case of the King *vs.* Pasmore, 3. T. Rep. 249, has extracted a rule which seems to be the only judicious one, as concerns false suggestions in patents. He adopts the reasoning in the cases of the earl of Rutland, 8 Co. 55, and the King *vs.* Kemp, 12 Mod. 78; "if the King be deceived by the suggestion of the Grantee, then the grant is void, but if the facts suggested by the Grantee be true, though the king be mistaken in his inference of law, the grant shall not be avoided," 17 Vin. 100, and authorities there referred to. The same reasoning is in one place admitted in Legats' case, 10 Co. 109.

All patents of the King, state the consideration or grounds of the grant. And where made upon information or suggestion of the Grantee, such information or suggestion is stated, as appears by the cases and precedents in all the books; such is the case in 10 Co. 109. 3 T. Rep. 199. King *vs.* Pasmore, and all the precedents of patents which I have been able to find. The consideration, or information, it were natural to suppose, would have been expressed on the face of the grant, when it is expressly laid down, that if the false suggestion makes no part of the consideration, it shall not avoid the grant, 6 Co. 55. 7 Bac. 602. Grants may be considered in four distinct points of view, as appears from the books. 1st, Those made *ex cer assentia*, *mero motu et gratia speciali*, or of his certain knowledge, own accord, and special grace. 2d, Such as contain this clause. with a clause of *quaequidem*, or specification of the grounds, or consideration of the grant, and if upon the information

or suggestion of the grantee, the particulars of such suggestion, as in Legats' case. 3d, Such as contain a specification alone. 4th, Where the grounds or consideration of the grant is the king's own affirmation, and not the suggestion of the grantee.

From a view of all the books, it seems to be the better opinion, that the grant in the first case is indefeasible, if not against law; 10 Co. Legats' case 7 Ba. Ab. 602. 3.

In the second and third, if there be any falsity in the suggestion, as expressed in the grant, the grant shall be void, though the clause of *ex certa scientia* be inserted, 10 Co. 112.

The fourth case stands upon the same footing with the first, p. 5 Bac. 602, &c. Vin. Ab. tit. Prerogative, 100; and cases referred to in this, and several other divisions.

As to the cases, in which grants shall be repealed on account of their being *void*, as being in deception of the King, or against Law, the books are equally plentiful of confused cases. The language of the books in many cases confounds the distinction between *void* and *voidable*. It however may be collected, that grants either absolutely *void* or *voidable* may be cancelled by Sci. Fa. A second grant for the same thing is void, yet Sci. Fa. lies. Jehk. Cent. 236 pl. 13. 17 Vin. 116 pl. 13.

Where a patent is granted to the prejudice of a subject, the King is of right to permit him to use his name, in getting the patent repealed by Sci. Fa. 2 Vent. 344; and this right extends as well to the second, as first patentee 2. T. Rep. 550 *arguendo*. 17 Vin. 121. Jenk. Cent. 126 pl. 56. That no Sci. fa. lies except the record of enrolment, or office found, be of the court from which the Sci. fa. issues. Bac. Tit. Sci. fa. C. 3. Vernon 281. Upon the last principle, a bill in Chancery was sustained, the record being of the Dutchy Court of Lancaster, and upon the ground of *fraud*. To this Bill it was objected in support of a plea, that there never had been such a case, and that the proper remedy was by Sci. fa. in chancery. But the chancellor overruled the plea upon the ground that it was proper to set aside a Grant by English Bill for *fraud*.

In Bac. Ab. Tit. *Void* and *Voidable*, we find the law treated of, on this subject, with more precision and method than in any other book. 7 Bac. 64 B. Acts may be void in several degrees, accord-

ing to the particular circumstances of the case, therefore the compiler considers, 1st. Acts which are absolutely void to all purposes. 2d. Acts void to some purposes only. 3d. Acts void as to some persons only. 4th. Acts void by operations of law, &c, 5th. Acts voidable only. 6th. How voidable, may be made good. 7th. How they may be avoided ; and 8th. By whom avoided.

Under the 3d division the compiler says, that no act can make a thing which is void, good, p. 68, and in the 7th division above, he adopts the principle contained in Whildale's case, 5 Co. 119, cited by Mr. Stuart for the defendant—That where an Act of Parliament says, that a deed shall be *void*, it is intended that it shall be shown by pleading, 3 Burr. 1804. 1 H. Bl. 75. In a note to this case in Bacon, the learned editor has these remarks. "It is not because the Deed may be avoided by special pleading, that it is therefore *voidable* ; but being only *voidable*, the party is bound to disclose that matter in his plea which shall avoid it, for *prima facie* it is good ; it passeth an interest ; it is capable of confirmation ; its validity therefore, shall not be questioned without giving the other party an opportunity of supporting it in his replication." page 68.*

Under the 8th division as above, the same author says, "of a void act or deed, any stranger may take advantage, but not of a *voidable* one, p. 68 ; again in page 67, under the 5th division, he says, "Though the statute of Westminster, 2, 13 Ed. 1. c. 1. says, *finis ipso jure sit nullus*, yet it is not void against the party, or his issue, or him in reversion," but may have remedy to avoid it, "and the words of the statute, *sit nullus*, are construed to mean, that it is *as good as void*, in respect to the defeasableness of it." So in the same page, in relation to the statute of additions, the language used is "*clearly void and of no effect*." Yet it shall not be absolutely void.

So far as the meaning of the cases has been collected from the books, the following positions may be assumed. 1st. That agreeably to the principles of the Common Law, all deeds made by persons competent to their execution, which take their rise in fraud,

* 6 East. Rep. 101 to 104, to the same effect.

are absolutely void, against all persons affected by them, but good as to other purposes ; the party making such a deed is bound by it, and can only avoid it by pleading. Such fraud can be given in evidence under the general issue, 10 Co. 109. and 2 Co. 50. cited at the Bar, where the false suggestion and misrepresentation of the grantees were fraudulent. Though the rights of prerogative in many cases will go further than the doctrine of fraud between individuals will warrant, in making a deed absolutely void, and equally warrants the giving such matter in evidence as in cases of fraud. 2d. Whenever a deed originates in some common vice or immorality, being against the policy of the law, as gaming and usury, and a statute declares it void, or is void, *ex turpi causa*, as in the case of *Collins vs. Blantern*, Wilson's Reports, it is absolutely so, and may be given in evidence collaterally. In cases where *assumpsit* lies, the matter of avoidance may be received in evidence under the general issue, Doug. 741. Though such immorality must be pleaded where the deed is made the ground of an action, being one of those cases, in the language of Ch. Baron Gilbert, "in which both public and private statutes ought to be pleaded; and then it is where they make void any solemnities; for in this case the construction of the law is, not that the solemn contracts shall be deemed perfect nullities, but that they are voidable by the parties prejudiced by such contracts, and one reason of this construction ariseth from the rule of expounding all statutes, that *quisquis potest renunciare juri pro se introducto*." Gilb. Law Evid. 42. 3.

These two classes, with that attached to the rights of prerogative, are believed to comprise nearly all the cases to be found in the English Books, in which evidence was permitted to be given of the invalidity of Deeds, by matter *dehors*, without pleading such matter agreeably to Whildale's case, 5 Co. 119. Matter appearing on the face, or on some public record, seems to be governed by a different principle. The intention of pleading is, that, agreeably to the forms of law, each party, by seeing what is intended to be litigated on record, may come prepared with testimony to investigate the point, and not be taken by surprise. This purpose is sufficiently attained in the cases from 2 T. Rep. 603. 7 T. Rep.

§06: The first respects the registration of deeds for annuities: The second respects the registration of bills of sale for ships. In the first case the deed itself would show whether it were *valid* or *void*, p. 610. In the second, the question arose under the general issue of non assumpsit, upon an Act of Parliament, respecting the registration of ships, providing that every transfer of a ship, otherwise than by bill of sale, in which should be recited, a copy of the registry, should be void. A bill of sale was produced, which did not recite the registry, the Court were of opinion that the transfer was *absolutely void*, and not merely voidable. A comparison of the bill of sale with the record of the registry which was open to all, would enable the purchaser to be apprised whether the transfer was *void* or not. This he must be supposed to know without pleading.

Where patents for new inventions come into view, and when the question relates to the falsity or truth of the specification, fraud mingles itself with the transaction, 1 T. Rep. 602, but the main ground upon which evidence is admitted as to the patent, in this, as well as all other cases of a similar nature, is not for the absolute avoidance of the patent. Buller J. in p. 607, observes that "when- ever the patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must show in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this, on his part is sufficient; and it is then incumbent on the defendant to falsify the specification." The evidence in these cases is necessarily involved in the issue, and must be produced by the plaintiff in making out his case. He must prove that the effect, proposed by the invention can be produced, and that the defendant has infringed the exclusive right communicated by the patent. If the plaintiff fail in the first, it is usual for the books to say, that his patent is *void*, and so it is as to the defendant, though the plaintiff may make the necessary proof in another case. This case does not apply to the one now before the Court: nor do the cases of *quo warranto* in 2 T. Rep. 515 and 561, in which the matter is brought before the Court by special pleading.

Having thus taken a short and imperfect view of the authorities, I have only to observe, that the case before the Court, does not fall within the meaning or principle of those wherein the King is said to be deceived in his grant, 2 T. Rep. 363.

With the help of these lights, we shall proceed to the examination of the Statute Law, and by a view and comparison of both, endeavour to obtain a result, so far as respects the statutes of North Carolina, and not those of this State, which do not now come before us.

In the construction of these acts, it seems to me that the rule insisted on, by the plaintiff's counsel, is correct. They should be construed *pari materia*, and to the authorities produced, may be added those collected in Ba. Ab. Tit. *Statute*. 1. Divisions 2, 3, 4 and 5. But I cannot accord with the proposition, that expressions used in one Statute, must necessarily bear the same meaning, in all cases, and under all circumstances, in a subsequent act. This, no doubt, is one of the rules of construction, Bac. I. 1. It is safe to recur to it, and follow the rules, where evident violence is not done to the context of the Statute, and plain meaning of the Legislature, to be collected from their act or acts, and circumstances under which the Statute was passed.

In order to comprehend the subject before the Court, with greater and more satisfactory precision, it will be necessary to take a view of some of the most prominent features of the different acts.

The Land Law seems susceptible of four principal divisions.

- 1st. In relation to county claims, or fifty shillings warrants.
- 2d. Military, including officers and soldiers county lands in civil rights, or those given to the surveyor of military lands and his deputies; Pre-emptions in consideration of settlements; Rights of the chain carriers, and markers attending the commissioners, their guard, hunters, surveyors, chain carriers, and markers attending the commissioners, in laying off the lands for the officers and soldiers, and adjustment of pre-emptions and attendant claims; and rights of Evans' Battalion.
- 3d. Lands sold for certificates at 10*l*. per hundred, or John Armstrong's warrants.

4th. General Regulations embracing every species of claim to which they can apply. Some of which, however, are repealed or suspended by subsequent clauses.

North Carolina, when legislating on the subject of her lands, observed a method peculiar to herself. The captions of all, and preamble of many of her subsequent acts on this subject, contemplate some one of the three first mentioned divisions. And into these acts thus headed, general regulations, are introduced, contrary to the usual form of legislating—1st. Thus we find the caption of the Acts, November 1777, c. 1. Ird. 292. April 1779, c. 6. Ird. 367. 1787, c. 23. Ird. 625, relating to the County Claims—2d. Military and Attendant Claims are referred to by the captions of the Acts, 1782, c. 3. Ird. 421. 1783, c. 3. Ird. 449. April 1784, c. 15. Ird. 483. April 1784, c. 58. Martin's private Statutes, edit. 1794, p. 137—3d. John Armstrong's Claims, by the Acts of 1783, c. 2. Ird. 446. April 1784, c. 14. Ird. 482. October 1784, c. 19. Ird. 539. 1786, c. 20. Ird. 589—4th, In relation to this division, or general regulations, they may be principally found in the 6th, 7th and 9th sections of the Act of 1777, Ird. 293—4. 1779, s. 6 Ird. 368. Acts 1783, c. 2. sects. 5, 6, 15, 16, 17, 18, 19, 20, 21. Ird. 446 to 449. April 1784, c. 14, sec. 4 and 7 Ird. 482—3. October 1784, c. 18, s. 6, Ird. 540, Acts 1786, c. 20. Preamb. and sec. 1, 2, 3, general as to all claims in the western country, Ird. 589.

In the construction of these acts, it will be also noted that the legislature passed but one amendatory act to their county system, before the opening of John Armstrong's office for their western lands, after which (except in one instance 1787, Ird 625) we find her professedly legislating as appears by the captions of the acts, on the subject of John Armstrong's claims, and introducing general regulations into those laws—except in the instance of October 1784 c. 19. s. 7, which respects the military lands alone. When legislating upon the subject of the second division or military claims, we do not perceive any general regulations, but we perceive in the particular acts, a silence in the legislature upon important and essential points, which irresistably leads to a conclusion, that they thought it unnecessary to express, that in a particular act, which was done on a former occasion, and which would govern

the mode of executing their will expressed, 4 Rep. 4. Ld. Ray. 1028. In this view of the subject, it is we perceive, that the act of 1782 C 2. S. 7 is silent as to what shall constitute an improvement, but the 3d section of the act of 1779 C. 2, made upon another occasion defines an improvement. So, as to entries, the act of April 1784. C 15. S. 1, respecting military claims, makes no effort to define of what nature the calls of an entry shall be, but the acts of November 1777. C 1. S 5. and 1783. C. 2. S. 11 respecting County, and John Armstrong's claims do. Nor is the manner of entering preemption, and other similiar rights, otherwise defined by the last mentioned act, S 9, than by reference to the above sections. So of caveats; the act of 1783. C 2. S 11. concerning John Armstrong's claims, speaks of caveats, but does not provide the manner of preventing; nor do the acts respecting the military division as above, but the act of November 1777 C 1 Sec 6-7, does. So as to surveys, the act of April 1784 C 15. S 3 is silent as to the mode of surveying preemptions, but the same section as to the manner of surveying other lands furnishes a rule.

The same observation applies to the 19th section of the act of 1783. C 2. The manner in which surveyors shall make the boundaries of their tracts, is not pointed out, but the act of November 1777. S 10 does.

Iredel 517, 1786 C 7. S 13 is silent both as to the entering and surveying Evan's Batttalion rights, but the method in use, previous to any entry law (Nov. 1777) may obtain, vide act 1715

C 33. Ird. 19: And lastly, the 2d section of the act of 1783. C 2, clearly conveys the idea that the legislature had under their consideration, entries for county, as well as John Armstrong's claims, which comprehended every species of entries, at that time. Af-

ter the legislature had been legislating upon each of the three divisions, of the land law, and when entries were required under them all, in October 1784. C 19. S 6, speaking of the removal of entries generally, they use the language, "by virtue of the law, commonly called the land law, now in force in this state," which is a legislative opinion, upon this part of the case, that all the acts of the legislature concerning the disposition of vacant land, should be taken into consideration in construing any one of them. The

design of the legislature by this act of 1777 was, to offer their vacant land for sale, in doing which, they by the 9th section provided, 1st. against impositions upon the state—2d. against impositions of one citizen on another. In the first was contemplated the Oath of Allegiance, and payment of the consideration money. 4th s.—If the state had any remedy on this ground, agreeably to the principles of Law, it would be sought by Sci. fa.

The other regulations of the act, as entering, surveying, &c. were intended for the government of individuals, in procuring a completion of their claims, so that one might not injure another. As to which, the legislature designed to give adverse claimants, an opportunity of opposing the emanation of a grant, by a right of caveat. Sec. 6-7 ; and it clearly appears from the language they used in the 6th section, that they had not any idea of an opposing claim, except from right of occupancy, by caveat.

Of an opposing or interfering claim from an Entry alone, the legislature had no idea at this time ; nor is there any provision in this act upon that subject—Perhaps they conceived from the country being extensively vacant, there was not any probability of it, except from occupants. There was no Court of Equity in the state at that time. Taking the whole of this act together, there was but one case, as it respected the civil law, or that governing the intercourse between citizens, to which the 9th section so much insisted on, could apply :—Viz. where a younger enterer shall procure a survey before the expiration of three months and obtain an older grant, to the injury of an older enterer. This being the time allowed by law for opposing a claim by caveat, which if not used, the claim was supposed to be abandoned, or neglected, and the parties without remedy. 1 Hay, 107, per Williams J.

There is not any provision in this act, as to the order of making surveys, so as to secure the right of the first enterer, because interferences from entries alone were not contemplated. The 5th and 10th sections are directory to the surveyor, as to the time and manner of making surveys, in which it is manifest that the legislature did not design, that the claimant or enterer, should have any agency, or control. The 5th section directs the entry taken to deliver to the surveyor an order of survey, and the 10th directs

the surveyor "*as soon as may be* to lay off and survey the same agreeable to this act, and make thereof two fair plats," which he shall return to the secretaries office, in order that a grant may issue.

In April 1779, the legislature took up the subject of interfering claims alone. Their first object was to procure a preference by law, to occupants and possessors. The first three sections, are employed for their security. The 7th directs the surveyor to return his warrants and plats within 12 months in order that a grant may issue. A provision omitted in the first act. The 6th is the first provision made by the legislature against interfering claims by entry alone. The remedy provided is a direction to the surveyor, that he shall survey entries in turn : the eldest being first surveyed. The legislature supposing that as the surveyors were directed to return their surveys, they would do so, in the order, in which they were made, so that grants would issue in the same order ; and in this way the oldest enterer would not sustain any damage. If the entry was caveated, the surveyor was enjoined not to survey either entry until a determination, and then the one prevailing ; which is one among many other reasons for believing, that by these acts, the legislature designed the grants when fairly obtained (allowing three months to a caveat) should be final and not affected by the 9th section. When considering the 6th section of the act of 1779, we are unavoidably led to ask, why did not the legislature declare unequivocally, that all grants obtained upon younger entries to the prejudice of elder ones, should be void, as they did in their acts of 1786 and 1787, for they must before this time, have been well apprised that grants were obtained upon younger entries to the prejudice of older ; or if this inconvenience was not felt then, surely it must have been before the act of 1786. The 9th section of the act of 1777 did not in my apprehension reach the case. If it did, there would have been no necessity for the acts of 1786 and 1787. Viewing the high and solemn nature of a state grant, and that parties had a full opportunity of caveating, it was with difficulty the legislature could bring themselves to legislate respecting their validity. Nor is it probable, that the surveyors then had surveyed generally, other-

wise than in turn that they would have passed the acts of 1786 and 1787. The courts of law, we know could not afford redress previous to the passage of the acts of 1786 and 1787, if then; which is the main question.

The next in order is the 19th section of the act of April 1783, c. 2. This section directs the surveyor to survey in turn, or according to number and date, and to express in his plats the number and date of each entry, to prevent the improper emanation of grants, and "disputes which have or may arise." But it is not said either in this, or the act of 1779, that if a grant shall issue, upon a younger entry to the prejudice of an older enterer, that it shall be void though they had established a Court of Equity (1782) previous to their last act. So high and important did they conceive a state grant, for they must have known, and felt, that injuries had arisen in a great variety of cases—considering that parties had an opportunity of caveating, they doubted whether the remedy, as introducing a general inconvenience, would not be worse than the evil.

The act of 1786, is the first in which we find the legislature declaring grants void for any cause whatever, as between citizen and citizen. In the decision of the question, now before the court, it is important to ascertain the meaning of this act, with as much certainty as possible—The first part of the preamble is declaratory by the meaning of their laws on the subject of entries—The act states that it was the meaning of those laws, that the first enterers should have *preference in surveying and obtaining grants*.—The acts of 1779 and 1783 convey the idea of obtaining the first grant, by necessary inference only. The surveyor is directed in these acts to survey according to priority of entry; and nothing is said as to the order, in point of time, of issuing grants, though as stated, the same order is implied from the contest.

The second number of the preamble states, that individuals had caused lands to be surveyed in the western parts of the state, (now Tennessee) upon younger entries, and had, or were about to obtain grants, to the prejudice of older enterers. To prevent and provide a remedy, the first section enacts, in substance, that surveys and grants of land, in the western part of the state "hereto-

fore or hereafter to be made or obtained, &c." by any person upon lands previously or first entered by any other person, shall be, and the same are hereby declared to be *void and utterly of no effect.*" So fearful and cautious were the Legislature, that they would not make a law to extend any farther, than as respected her western land, which was not held in very high estimation, or she would not have ceded it to the United States a few years afterwards, (1789). But she had shown the slight estimation in which she held her Western Territory, by a cession to Congress in the year 1784, which was not accepted. When we consider, too, the time this act was passed, there had recently been a strongly marked misunderstanding, between the eastern and western citizens of North Carolina (vide Acts 1785, c. 46. Ird. 566, 1786, c. 23. Ird. 597) which made the State much less attentive to her western citizens, or lands. These ideas are preliminary to a remark on the wording of the act, in one particular, which is singular, and shows the probability, that the act was drawn without attending to the previous laws on the subject. The act speaks of "persons having caused lands to be surveyed, and plats to be returned," &c. This is contrary to the express provisions of antecedent acts, in which it is made the duty of surveyors, as public officers, to survey lands, and return the plats, without any regard to the claimant, or others, and this was so determined by the Superior Court at Nashville, in the case of *Blakemore vs Chambliss*, when the case was fully discussed and considered; vide also the case of *Dickey vs Hoodenpile*, 1 Hey. Rep. 358.

The recital in this preamble cannot repeal the well known and established law, that the survey and return of the works, under the laws of North Carolina were entirely the acts of the surveyor, in which, in contemplation of law, the claimant could have no agency: The intention of the Legislature however, is clear, that grants obtained upon younger entries, to the prejudice of elder ones, should be *void*; but whether absolutely *void*, or only *voidable*, will be presently considered.

The act of 1787, c. 23, need not come into view: it is the same in substance, with the last act, extending the remedy to older en-

tries, in every part of the state, which was not done by the Act of 1786.

It is insisted, that wherever an act declares a deed *void*, or *utterly void*, the matter dehors, producing the avoidance, may be given in evidence, without pleading, in all cases, as being absolutely *void*, and not merely *voidable*. This is certainly not the law, as the authorities will show, particularly Whildale's case, 5 Co. 119, and the note in Ba. Ab. 68.

The general principle seems to exist in these cases, and adverted to in Gilb. L. E. 43, where the great lawyer observes, that "what shall constitute the solemnities of a contract, is matter of law, and so it is how these solemnities ought to be defeated, and destroyed; and again, "it were preposterous that the law should require that the contract should be offered to the Court, that it might appear to be legally made, and yet, that it should not be offered to the Court how it is defeated; both certainly must be determined by the same judicature; for it is absurd to say, that the Court should determine, that the contract was lawfully made, and that the jury should determine that it was lawfully determined." From hence, and other ancient regulations, we see so many special verdicts, in lord Coke, and other reporters. But our juries, seldom render them, though sometimes suggested by the Court—They determine intricate points of law, which was rarely the case anciently. It must be recollected, however, that this general principle, is subject to exceptions in the case of fraud*, the king's prerogative, and other instances which have been mentioned,

*"The most remarkable feature of the laws of England, is an antipathy to fraud and deceit. The robust temperament of our early progenitors, while it qualified them to repel violence by violence, afforded them no protection against artifice and circuitry. Their first essays in legislation, were directed by their prevailing anxieties. The article of *Covin* was therefore the principal title of their conservative jurisprudence, and their abhorrence of subtilty carried them at once beyond the object of punishment to the method of prevention. In the first rudiments of our law was comprized this notable aphorism, "that fraud and *Covin* vitiate every title; and even right itself is turned into wrong by circumventing to obtain it." Roberts on Frauds, Preface xxi. And again, the same elegant and judicious writer, when speaking of the reception of parol evidence, in relation to specialties or deeds,

The principal case it is believed, lies without the limits of the exceptions to the general rule. The only ground on which a court of law can receive the evidence of the entry, with its concomitant parol proof to ascertain its locality, is fraud in the patentee, which is not warranted by the statutes, or facts. The land law as before remarked, supports the position, that the survey and return of the plat, are acts of the officer, and not of the party. The secretary then issues the grant without application. In this transaction there is no ground to suppose fraud in the party. If he obtain an elder grant, it is owing to the acts of the officers of government, over which he had no control.

The emanation of a grant to the prejudice of an older enterer, is owing, either to a mistake in the surveyor, in surveying and returning a younger enterer's claim, before an older; or in the secretary, in issuing a grant upon a younger entry, and return, before issuing on an older one.

The wording of the acts, shows, that it was owing to the surveyors, improperly surveying younger, before older entries, that the injury arose which they meant to redress. They do not say any thing respecting an entry, being improperly made, nor will the state of things permit us to attach fraud to a person making it. And if fraud had mingled itself with the transaction, we

under the head "of the admissibility of extrinsic evidence to prevent fraud, correct mistakes, and to protest against the consequences of loss or accident, he observes, "there are three branches of doctrine still remaining to be considered with relation to this intricate learning, which arise principally out of the particular jurisdiction, and relief of Courts of Equity, viz. *Fraud, accident, and mistake*. Fraud is a subject of relief in equity, and a bar at law, to which no solemnities of authentication can be opposed, and the anxiety of our courts of judicature to prevent its success, has, where its existence is the object of proof, made extrinsic and parol evidence admissible. And, indeed, the steps by which the Courts have progressively proceeded, in subjecting written instruments to the control of parol evidence, are said to have had their commencement in the cases of fraud. Though the Statute of frauds and perjuries may have increased the jealousy of parol evidence, yet it raises no barrier against its admission, where it professes and tends to support a charge of fraud, page 78. Vide the act to prevent frauds and perjuries, Ten. Laws, 1891, c. 25.

have the authority of an eminent lawyer, that the evidence ought not to be received.*

It is manifest then, from this view of the subject, that the legislature designed to avoid the patent, for being irregularly issued, and not on the grounds of fraud, in the patentee, which was not, nor could not, be presumed from the construction of the statutes, or otherwise, 1 co. 52 b. 10 co. 56. co. lit. 232. 273.

* 3 Tucker's Black. 261. Note 10, per Tucker, and the opinion of the Court of Appeals in Virginia in the case of Witherington *vs* M'Donald, in Ejectment, June 1807. Mum. and Hen. Rep. 306.

In this, the case of Hamilton et alias, *vs* Wells, was commented on, in which the same Court, in June 1791, decided, that fraud might be given in evidence in a Court of Law, in avoidance of a patent. It is here said, that the point in the last case was decided by three judges against two, and that the law, even on that ground, was considered as not settled. Judge Tucker professed himself never to have been satisfied with the decision. Roane J. said, as there was no question of *fraud*, an argument was unnecessary. Lyons J. said, his opinion in the case of Hamilton et al. *vs* Wells, was, and still is, that *at law*, no evidence can be adduced to impeach a patent. After these observations, of which the above is the substance, Judge Tucker delivered the following opinion: "There being no suggestion of fraud on the part of the plaintiff in obtaining his patent in this case, we are relieved from the necessity of discussing the decision of this Court, in the case of Hamilton et al. *vs* Wells, June Term, 1791, in which the defendant offered to prove, the plaintiff to have him guilty of fraud, in obtaining his patent, by procuring a plat to be returned to the register's office; knowing that an actual survey had not been made. By a note of that case, yesterday read in Court by one of the Judges, who copied it from a note of the late president, Mr. Pendleton, it appears that other extraneous evidence was offered and rejected by the Court, on the trial of that cause."

The three points of testimony rejected, are there stated, and the judge proceeds "all which testimony this Court appears to have considered as properly rejected. The evidence offered in the present case appears to me to stand on the same footing. It might perhaps, have availed upon a caveat, a proceeding calculated to prevent the emanation of a patent, where the party applying for it, does not proceed in the manner which the law requires; but a patent being the highest evidence of a complete legal title, and a matter of record, no evidence not in itself sufficient to avoid it, ought to be admitted to go to a jury on the trial of an ejectment.

If the law does not presume there was fraud in obtaining the old-est grant, nor any actually shown, the grant cannot be absolutely void, but voidable only, on the ground of irregularity, or mistake in surveying and issuing the grant. We cannot suppose that the legislature intended to make a grant *absolutely* and *ab initio* void, for a mistake or irregularity in their officers, because it might happen to interfere in part with another claim. In this way it would happen that an elder enterer, might not interfere more than ten acres in a thousand, and the grant of the younger enterer for 990 acres, to which no claim existed, would, according to the position insisted on by the plaintiff's counsel, be *utterly void*.

The uniform opinion of our courts and universal sense of society, are adverse to this proposition.

Besides, the legislature of North Carolina by their act of 1796, c. 9, respecting the lands of this country, have given us their opinion, by allowing younger grantees, in all cases to locate such part of their lands as may be covered by older grants elsewhere.

Now if they had conceived such a grant *void ab initio*, they would have made some provision respecting the part not interfered with, which, being a loss, would equally require relief. The case too, put by one of the counsel for the defendant, also shows that such a grant was not designed by the legislature to be rendered absolutely *invalid*. The case put supposes two entries, an older and younger; the younger gets the oldest grant; then according to the position contended for by the plaintiff, the act would operate upon it, by making it an *absolute nullity*. The elder enterer removes his entry or claim; and thus the act would operate a destruction of the younger enterer's grant, when after the removal there would not be any claim to contend with; for being *absolutely void* in its commencement, it could not be confirmed as a *voidable* grant could. 3 Rep. 64. b. Doug. 52.3. 1 Str. 94. Co. tit. 259. b. If absolutely void, it would stand in the same situation as a patent in England after being repealed, or cancelled, 4. In. 88, which would go to the whole patent, and not to a part, unless there were independent clauses, 17 Vin. 118.* The evident meaning of the legislature was,

* *Vide Cross vs. Faustenditch Cro. Jac. 180.*

to make the patent *voidable* on account of a mistake, so far as it might affect an elder special enterer. Without such a regulation, they conceived the party was remediless : and so he was, under their statutes, and the common law, which alone they had in view. When an act is intended for the benefit of an individual, to force it upon him, is contrary to the universally received opinions of law. Gilb. L. E. 43. 1. Bl. Rep. 192.

From the best view, I am able to take of the act of 1786, it appears to me, that the legislature designed that such a grant as is now under consideration, should *be voidable* and *not void*. Com. Dig. tit. Parliament, R. 10. 11 12. p. 256. If merely *voidable*, it remains good until avoided in a due course of law by pleading.

The ground upon which all the books proceed in permitting evidence to be collaterally given, to avoid the solemnities of a deed, is that it is absolutely void (and not voidable, which always supposes pleading to do it) either as to all persons, or those affected by it. Vide Dyer, 149 a. note (80) Leonard vs. Bacon. Cro. Eliz. 233. Gooch's case, 5. Rep. 60. Fermor's case, 3 Rep. 786. Dyer, 295 b. pl. 16. Hob. 72. 166. Ch. Rep. 131. Shepp. Touchstone, 66. Bethel vs Stanhope, Cro. Eliz.—810. Lex. Prac. 293.

In giving this opinion, I might stop here, but as it has been long agitated, and has excited much interest, some indulgence will be allowed, in the expression of such ideas, as have occurred in relation to the proceedings of a court of equity on this subject, and the argument *ab inconvenienti*, so extensively adverted to at the bar, by the counsel on both sides. In North Carolina, 1798. c. 7, they erected a court of patents as it was usually termed : and directed a Sci. fa. to issue in behalf of the state, to repeal grants upon the ground of fraud. It is understood that no process ever issued from this court, and as I have heard, the judges conceived they had no power to act under it constitutionally at least, so far as respected innocent purchasers. Be that as it may, the enactment of this law, furnishes strong ground to conclude, that the legislature, conceived, there was no law in force, authorising such a proceeding in behalf of the state. No other idea, as it respects this subject, can be collected from it. The act did not profess to afford

relief to individuals. As to them, it has not been understood to be the practice in N. Carolina, or any other of the U. States, to use the name of the government, in obtaining redress by procuring a repeal of patents. The ordinary principles of the civil law has been esteemed adequate to all purposes. In England the mode of proceeding by *Sci. fa.* to repeal patents of the king, originated in the exclusive rights of prerogative; and upon it was ingrafted permission to the subject, to use the King's name, in repealing a grant by which he might be affected.—Having a grant from the King, or standing in such a situation, as to be affected, he partook of the rights of prerogative; but even then, it appears that this mode of proceeding to obtain relief, was not confined to the law side of the Court of Chancery, 1. Ver. 277 to 282.

But as we do not find in N. Carolina, nor any other State where they have a court of equity, that the method of *Sci. fa.* in the name of the state, has been adopted, we may fairly conclude that it is not applicable. Even in England, it is an exercise of the highest power on the part of the government, and given to the Ld. Chancellor alone, 4. Int. 88. For a state to repeal her own grant, otherwise than upon the principles authorising a citizen to obtain relief, is a position which cannot be admitted.

To cancel grants, without evident necessity (which cannot occur if they, themselves, do their duty) would at all times, excite disagreeable sensations, in a government like ours, formed, and resting on public confidence.

It has been strenuously insisted, that, as no other than a Law Court, took cognizance of grants, with a view to their abrogation or setting them aside, so none but a court of law can here.

The case cited from Vernon, shows that in all cases of fraud, the Chancellor, by English bill will afford relief, by setting the patent aside, though he will not proceed to its cancellation. Nor in fact is this necessary.

Equity, it is said, can do no more than a Court of Law. This is not admitted, for a Court of Equity can by Statute (1801, c. 6. s. 48) divest a title without conveyance, act *in rem* as well as *personam*, (1787, c. 22. Ird. 624. 1801, c. 6. s. 4) and can decree a deed, patent, or conveyance, to be set aside, and held for naught.

In fine, the Court of Equity, which was revived in 1782, c. 11. Ird. 433, has given to it all the powers incident to such a Court, with the additional powers since conferred.

A Court of Law can only act negatively, agreeably to their forms of proceeding in cases of this kind.

They may say, that the patent shall have no effect in the trial before them. It is however, still alive, upon which another action may be commenced, as in the present instance, and *at last*, after much litigation, vexation, and expense, it is admitted, that recurrence must be had to the Court of Equity, for the purpose of setting it aside, or divesting the title, to quiet the party.*

But a Court of Equity can do more. They may do that, which a Court of Law, have it not in their power to attain at all times—They can preserve legal principles, as respects real property, unbroken—in fact, from annihilation, by keeping law and fact distinct from each other; it being a maxim as ancient as the law itself, “to questions of law, the Court shall answer, to questions of fact, the Jury shall answer.” In Equity, the Court direct issues† for a jury, simply of fact, (vide Barnard, Rep. 90. Roberts on Fraud, 273) unmixed with legal principles, upon which alone the Court decide. There the Jury ascertain the facts, or special calls of the entry, as names, and locality of creeks, springs, &c. and then the Court construe the entry, which is matter of law.‡

In this manner, decisions will be uniform, and the law, or uniformity of principle, be saved to its proper judicature—the Court, whose constitutional and legal duty it is to expound the law, and the Jury to find the fact. Law is a standing, inflexible rule. Dif-

* “The law delights in certainty and quiet, because without these there can be no liberty.” 4 Dall. App. viii. per Dickinson, J. of the Court of Appeals in Delaware, Sept. 1788.

† Vide 1 Bro. Ch. Cu. 99. Rob. on Fraud, 444–5.

‡ Judge Wilson, adopting the opinion of lord Hardwicke, observes in the 2d vol. of his lectures on law, p. 371, &c. “that it is of the greatest consequence to the law, that the powers of the Judges and Juries be kept distinct; that the Judges determine the law, and that the Jury determine the fact; unless it be in cases where law and fact are inseparably connected, when Juries must act on both—and conclusively so in criminal cases.

ferent juries from different parts of the country, unacquainted with law, and the business of the courts, with different impressions, will think, and decide differently. Law, or the inflexibility of principle, and sameness of rule, is lost:—Witness, the many mistrials, and different verdicts, in the same land cause. Independent of this, great delay and expense, occur on the law side, owing to the introduction of a mass of irrelevant testimony. The attorneys, and parties, not knowing on which point their cause will turn with the jury—nay, with the Court too, for proceeding in this way, as we have done for a considerable time (which usually excites much interest in a neighbourhood) no principle can be said to be settled.

It has been remarked by one of the counsel for the plaintiff, that so far as his experience has extended, juries have as often been right in land causes, as the Court. This, to be sure, is not a very high compliment to our superior tribunals of justice: But having had twenty years' experience at the bar, and on the bench, it has occurred to me, that the courts have seldom given any express opinion at all, upon the construction of entries. Until lately, in almost every case, the Courts left the construction to the jury, which by law, belonged to them*. Upon this principle, it is supposed, that as the jury had the whole case before them, they might decide it, as they thought proper. Is it not much better, for the public good, to have recourse, in the first instance, to a Court of Equity, where the matter can be finally decided at once, than after being harassed by several (as in this case) dilatory, vexatious and expensive ejectments—to go there then, when it may not be in the power of the Court, to do complete justice, between the parties, on account of the death of witnesses? It is urged, however, that a suit in Equity, in such a case would be much more expensive and dilatory, than at Law. Inattention to the practice on the equity side of the Court, alone, could have given rise,

* Washington J. when speaking of the powers of the Court and Jury, in relation to the assessment of damages, observes that "it belonged so peculiarly to the jury, that he could not allow himself to invade their province; while he felt a determination to prevent on their part, any invasion of the judicial province of the Court." 4 Dall. 391.

to much, if any, additional expense, or delay. It is true, that the officers' fees are somewhat higher in Equity, but this, it is believed, is greatly outweighed by the number of unnecessary witnesses, attending in a Court of Law, which would not be the case in a Court of Equity, as each fact to be contested would be simple, and distinct.

If the cause is heard upon bill and answer, it stands for hearing at the second term, in the same manner with a suit at law : And if the plaintiff contests the answer by replication, in ordinary course, (if attended to) it is ready the term afterwards, and that is as soon as we find parties ready for trial, in a weighty land cause, where it is usual to find one or the other of the parties, under the necessity, or wishing to procrastinate.

In Equity, the facts being simple, stripped of legal principle, and not affording a hope of exciting the feelings of a jury, the parties would be much oftener ready for trial ; and consequently as many suits, decided in equity, as at law ; decided, did I say : none can be finally decided at law. *Expedit reipublicæ ut sit finis liticem.*

But if the case in Vernon could not authorise the interposition of a Court of Equity, the general and universally received principles governing that Court, would. Metf. 103, 4 Barton 17, 20. Lord Kaime's Prin. Eq. 404 to 408. 577.

In the last of these books, which is of great authority, we may collect this position : That wherever the dictates of abstract justice, or a sound conscience, demand redress, and the ordinary forms, or principles of law, cannot adequately afford it, then a Court of Equity will interpose, unless opposed by positive institutions, or public convenience.

But the most forcible argument against receiving this evidence yet remains. The uniform and unequivocally expressed opinions of the courts of North Carolina, where these statutes were made, and immediately acted on, are opposed to it.

Cotemporanea expositio est fortissima in lege.

As much reliance has been placed upon the opinion of Heywood J. as collected from his Reports, and the opinion of the whole Court, in 2 Hey. 98, in support of the admission of this testimony, and as it is a book of great authority and utility, I will take the

trouble to examine succinctly each case, and see if the argument on the part of the plaintiff is supported on this ground. The first is the case of *Reynolds vs. Flinn*, 1 Hey. 106, Sept. 1794. In this case the defendant, who had not a grant, offered to prove that the plaintiff had fraudulently obtained one, by erasing the name of the original enterer, under whom he claimed, and inserting his own, having a knowledge, that the entry had been previously sold under execution. The Court rejected the testimony, observing at the same time, that "it would be of the most dangerous consequence, to avoid a state grant by parol testimony," that the meaning of the 9th section of the Act of 1777, was, that it might give the State a *sci. fa.* Not that a grant should be avoided upon evidence in ejectment by an individual citizen. The defendant might have entered a caveat, and as he did not do that, he was remediless in that Court.

In the case of *Sears vs. Parker*, October 1794, 1 Hey. 126, we find the opinion of the Court, in page 135, "we have often decided, and are now of opinion, that the state having granted vacant land, the first patentee will be entitled to hold them, notwithstanding any attendant circumstance, that render it *voidable*, until it be actually avoided in the Court of Equity; and that it cannot be avoided by any parol evidence given to a jury, in a trial in Ejectment." This opinion was held by men of great experience as judges, upon the same statutes which govern us in the case before the Court. It is precisely the opinion I hold. Again, in p. 375, *The University vs. Johnson*, per Heywood, J. who was of opinion that the grant was *void ab initio*, and that its *invalidity* might be shown in Ejectment. This was correct, but that invalidity did not depend upon any thing like the principles now under discussion.

The opinion rests upon the point of the *entire want of authority*, in the governor and secretary, to issue such a grant. It was *absolutely void*, and not merely *voidable*. Vide the case stated in p. 373, and 17 Vin, 114. S. b. pl. 2. 5 Rep. 30. 8 Rep. 135. Cro. Eliz. 457.

The case of the *University vs. Sawyer*, in 2 Hey. 98, depends upon the same principle with the last, and is good law, but has

no relation to the point before the Court. But the opinion of Judge Heywood, in *Foreman vs. Tyson*, 1 Hey. 497, is said to be decisively in favour of the admission of the testimony now offered.

The book is certainly of considerable authority, and I should reluctantly differ from it, in any case, but if the opinion is as is insisted on, I should be constrained to do so.

The report of the case, however, furnishes no ground to suppose that the evidence offered, was of the same nature, with that offered to the Court, in the principal case. As reported, the case stands thus: The plaintiff produced a state grant, dated the 21st October, 1782, to one James Lenoir, and deduced title to himself.

The defendant also produced a grant for the same land, dated on the same day; thereupon the plaintiff stated, and offered to prove, that Tyson's grant, was obtained against the provisions of the act of 1777, c. 1. s. 9, which declares all titles obtained, otherwise than according to the directions of that act to be void. Davie, for the defendant, stated that the decisions of the Courts, ever since the act of 1777, have been, that grants, under such circumstances, shall be avoided in a Court of Equity, not by repealing the grant, but by deceiving the grantee to convey. Baker *à contrà*, insisted, that whenever an act provides, that a deed shall be void, the circumstances making it so, shall be given in evidence, under the general issue, the deed being void to all purposes; and cited 2 T. Rep. 604. 515. 561. 568.

Davie, in reply. Grants of the state, or of the king, are of record, and cannot be avoided but by something of as high a nature. Therefore it is, that it is necessary, there must be judgment upon *sci. fa.* in England to repeal them, before they can be invalid. But if the cause of the invalidity appears of record, there is no necessity for a *sci. fa.* and the Court may proceed to vacate by judgment, without any verdict upon *sci. fa.* Vide Bl. Com. In the present case, no cause of invalidity appears of record, and the grant is valid, and cannot be avoided in Ejectment by parol testimony.

This argument of Davies was perfectly correct as to grants *voidable*, but not those which are void *ab initio*. Heywood J. observed upon this argument, that if the case were *res integra*, he

should be of opinion, that the evidence ought to be received, but the case as reported, does not inform us what the evidence offered was. Probably it was such, as showed, that there was not any authority by law, for issuing the first grant. If it were such as the two cases of the University of North Carolina *vs.* Johnson, and the University *vs.* Sawyer, 1 Hey. 373. 2 Hey. 98, the judge was certainly correct. In each of these cases, there was no authority to issue the second grants at all. The act of 1777, only gave authority to issue grants for such lands, as were then vacant*. The grants under which the plaintiff claimed in the first case issued in the year 1763; in the second, in the year 1771. That the state did not give any authority by their act of 1777, to issue grants for lands granted previous to that time, is evident, for the only remedy for contesting a grant, provided by the legislature in the 6th and 7th sections of the act, by caveat, could not be reciprocal, and therefore could not apply to cases where grants *had issued*, previous to the passage of the act. From the usual correctness of the reporter, it is fair to presume, that the case of Foreman and Tyson was similar in principle to the other two—that the grant was *absolutely void ab initio*, and not *voidable only*, as in the present case: And the case may not inaptly be compared to the acts of Courts, with, or without jurisdiction. In the first, their acts were *voidable*, in the latter, *absolutely void*. In the two first cases, however, this was not the point before the Court, the plaintiffs having the oldest grants, were, upon that ground enabled to recover agreeably to the former decisions.

The law as it respects the case before us, is so clearly, and accurately laid down by Judge Williams in the case of Dickey *vs* Hoodenpile Sep. 1796. 1. Hey. 358, that I cannot avoid stating it *verbatim*.

He observes, in page 359, “when a grant once issues for a tract of vacant land, it becomes the only evidence of titles and we cannot afterwards look further back than the grant. We must admit antecedent proceedings to have been regular, otherwise we should introduce the practice of invalidating grants by parol tea-

* Vide 2 Washington's Reports, iii.

timony.* The grant may be suspended, and a trial had when a claimant proceeds to survey and return plats of other lands, than those he has entered, to the prejudice of another who has entered them, and M'Dowell (under whom the defendant claimed) should have proceeded this way—As he has not done it, he has slipt his

* *Eodem modo quo oritur, eodem modo dissolvitur*, is a maxim of the common law, the importance of which, can easily be discerned by all reflecting persons. In the same manner, in which a thing takes its rise, in the same manner it must be dissolved.

Although this principle may have been, in a few instances relaxed by statute, to meet the smaller and more frequent concerns of men, as in the evidence of payment to a bond, &c. still the maxim remains untouched in the higher concerns of life.

If one man make a deed for land to another, nothing less than a deed, or decree in Equity, can restore the property, or put the legal right in other hands.

Some of the most eminent English Judges, have considered the statutes of limitation, and of frauds and perjuries, as highly wise and beneficial—we have adopted their most important provisions.

For what purpose were those enactments? Manifestly for the peace of society, by narrowing the range of verbal testimony. The legislature considered such testimony as fraught with uncertainty, and too frequently with perjury, as the caption of the act imports.

How does the principle of practice which we have adopted accord with the maxim, and spirit of these regulations? Is it possible, that the Legislature designed by the act of 1786, to put their grants on the same footing, with parol contracts—subject to the same uncertainty; and that too, after having proceeded so cautiously as they had done, and after giving the party an opportunity of caveating—a method of proceeding, on the premises, and exclusively under the cognizance of a jury, before the solemnity of a grant takes place? Least, however, the provisions respecting caveats might not be effectual, a further guard was provided, in that respect, before the issuing of a grant, by the 21st section of the act of 1783, C. 2. Ird. 449.

Though the time for caveating may have expired, upon complaint being made on oath, and sufficient reasons shown to the governor, he is directed to suspend issuing a grant, and to direct the secretary to certify the same to the court of the county where the land may be, and the Court shall, upon receiving such certificate from the secretary, order a trial by jury, in the same manner as they might do, if a caveat had been made in the office of the entry-taker, and the proceedings to be conducted in the same manner.

time, and cannot now object to the grant. It seems unjust, that he should lose his land by the mistake of the surveyor, who has surveyed the lands entered by him, for the lands entered at another place by Dickey—but Dickey, by that mistake, has lost the land he entered; for it is said, that another person has since obtained a grant for it. It is possible, Mr. M'Dowell might obtain redress in a Court of Equity, but I am clearly of opinion, he has no remedy in this Court. Our Courts of Law, have uniformly decided that whoever obtains the first grant, shall be the legal proprietor, without any regard had to the first entry*, or first survey, and indeed, without regarding whether there was any entry or not—the court will not go back to these circumstances."

The same point is admitted in 1 Hey 178. 318. Thus, it appears, that the uniform and uninterrupted decisions of the courts of North Carolina, since the passage of the act of 1777, to this day, is opposed to the admission of this testimony. Either they have been in an error, or our courts have, since the year 1798. From this examination, I conclude, we are in an error, and that too, pregnant with the most pernicious consequences, not only as it respects the uncertainty of land titles, but the whole business of this Court, which has become accumulated in other instances, in consequence of the delay and tediousness incident to trials in Ejectment. Since the spring of 1789, I have had an opportunity of observing the practice in this State.

* Though particular statutes have made this inchoate, equitable right, subject to taxes, and debts, they have not altered its original nature—After the emanation of the grant, it *is merged and ceases*. 1 Hey. 318, per Heywood J. Ird. 1782, c. 7. s. 3. as to taxes, and the acts of Tennessee, since it was a government. As to Debts, Ten. Laws, 1794, c. 5. s. 7.

As to descent; when a person has a right to land, evidenced by a warrant—in many instances the executor or administrator, has exercised control over the warrant. But if the personal representative should not exercise any control over it, the State issues a grant to the heir. Whether this be law remains to be decided. This dispute, however, between the heir and executor, respecting an imperfect right, has no effect upon the case before the Court.

The alienation of the entry, seems to depend upon the disposition of the warrant, as its principal. Like other choses in action, warrants are assignable.—*Editor.*

From that time, until the decision alluded to, at Jonesborough, the understanding of the Court and Bar, generally, so far as it appeared to me, was against the present practice, and as stated in Heywood's Reports. The same principle is recognised in 1 H. B. 461. 1 T. Rep. 735. 2 T. R. 684. 4 T. R. 682. 7 T. R. 501. 5 East. 138-9, and 3 Dall. 465, per Iredel, J. Supreme Court of the United States.*

In the case of *Kerr and Porter* in this Court, this decision at Jonesborough, was for the first time brought up in argument. Then acting as counsel for Porter, I opposed it, with all the argument, a sudden occasion enabled me to offer, pointing out the dangerous consequences of so great a departure from the principles of the Common Law, but was over-ruled. When Judge Jackson came on the bench, the question was again revived: then, and still believing the decision at Jonesborough was incorrect. Campbell and Roane, judges, thought it safest to adhere to the decision at Jonesborough—Jackson, J. dissentient.

So far from the practice having been considered as perfectly settled, there never was a Court since the decision, but was divided. The bar have uniformly been so, to the present day.

It is urged that the Court have no power to change the practice. The Legislature alone are competent to it. Far be it from me to wish the change of any established principle, either of Statute or Common Law. This far transcends my powers, or wishes, but it is surely competent to a judge, upon the maxim of *humanum est errare*, to correct his own errors; or those of his predecessors, where they are clearly perceived, with their injurious consequences.

Wretched, indeed, must that judge, and people be, where there is no *locus penitentia*.†

The best and most enlightened of men, are but weak, and liable to error; and the English books furnish examples of a multitude

* Vide also 6 East. 530, legal title only in Ejectment. 2 Johns. Rep. 84. 221. 6 Vin. in 174. 3 Bos. and Pull. 162. 5 T. Rep. 434. 6 T. Rep. 604. 4 T. Rep. 636.

† An instance where a point of practice was reversed by a subsequent decision, 4 Dall. 140.

of cases and principles, over-ruled by the same, or succeeding judges; of which, one of the most remarkable is, that of *Coggs vs. Bernard*, in Lord Ray. Rep. which, nearly a century after Southcote's case in Lord Coke's Reports, over-ruled it, upon an important point of law.

Judges, however, ought to be extremely cautious, how they impugn principles, which have received the sanction of time and acquiescence; particularly those which relate to rules of propriety.

The case now before the Court, is not of the latter class; if it were, I could not persuade myself to touch it, if acquiescence had accompanied the decision at Jonesborough.

A point of practice is more within the control of the court, where the legislature, nor general acquiescence has not put it at rest. It is not doubted, but the person holding an older special entry may have his remedy; the only dispute is, as to the method of obtaining it; whether it shall be in this action or in a court of equity.

With the view already taken of the subject, and with a belief, that the legislature of N. Carolina well knew the inconveniencies, arising from younger enterers obtaining older grants, previous to the act of 1786, having had the subject frequently under their consideration—that apprehending, a flood of inconveniencies from a permission to younger grantees, to contest by parol testimony, the validity of a grant in a court of law, they purposely avoided it, having then no court of equity—that when they had, where alone pleading can take place, both parties fairly heard, and judgment of *vacatur*, rendered—they proceeded with timid cautious steps, extending by their act of 1786, the provision to the western part of the state only; and having thus broken the way, extended it to the whole state by their act of 1787—I cannot avoid thinking that when they declared such grants void, it was only expressing their will, that they might be contested, but left the mode of doing so, to the existing laws, as they did with respect to entries, caveats, and surveys, in some of the land laws, and that this entry with its concomitant parol testimony as to its locality, cannot

be given in evidence.”—I conclude with that great, and amiable man Mr. Justice Iredel,—whose elegant language I will take the liberty of using,—“that it is of infinite moment in my opinion, that principles of law and equity, should not be confounded, otherwise inextricable confusion will arise; neither will be properly understood; and instead of both being administered, with useful guards, which the policy of each system has devised against abuse, an heterogeneous mass of principles, not intended to assort with each other, will be blended together, and *the substance of justice, will soon follow the forms calculated to secure it.*

* The remarks made by a learned judge in Schoale and Lefroys Rep. 69. on a similiar occasion, have great force in the principal case. After commenting on the case of Yea vs. Buckwell in Cowp. Rep. respecting the authority of Lord Mansfield for giving equitable matter in evidence in ejectment, and the mischievous consequences which had resulted from the decision, he proceeds, “Was there ever an instance, where a person having a legal title, was forced into equity, against a person having barely an equitable title? In this very case for example, see how principle would be subverted. Suppose the defendant were to be driven into a court of equity; he might go there with a clear case to entitle him to relief; but if the plaintiff is driven into equity, the defendant lies under no difficulty; whereas the plaintiff cannot succeed, for a court of equity, will dismiss his bill, and tell him “your title is at law, go into a court of law,” and then it will come to this, that the plaintiff will not be relieved, either at law, or in equity; at law he is barred by the equitable defence; and having a title at law he cannot go into equity.” So would be the reasoning respecting the admission of an entry in evidence in ejectment. If a jury mistake, or pertinaciously adhere to an erroneous construction of an entry, where is the plaintiff’s relief, it may be asked? In some court, it would be the immutable dictates of justice. To equity you then must have recourse, as the court competent to afford relief, where by accident or mistaken apprehension of an equitable principle of law, a court of law fails in affording that relief.—It might be otherwise, if the matter in contest were purely of a legal nature. It may be asked in the manner of the learned judge to whom allusion has been made, whether there ever was an instance, in which any thing but patents or deeds was admitted as evidence of a legal title, except in the practice referred to in the principal case. The state law requires that all conveyances of land should be by deed.

Humphreys J. It would be rash in me to alter the practice which has prevailed for twelve years, unless, for reasons which were perfectly convincing.

I will receive the evidence offered, and if upon mature deliberation, I shall form an opinion that the admission of such testimony is illegal, I will mention it when this point shall come again before the court.

Grundy, enquired, if the question was to be considered open to argument hereafter, to which *Humphreys J.* replied,—most assuredly, for that he had not as yet formed any decided opinion.

The entry was given in evidence to the jury, and was followed by much evidence on both sides.

Per Curiam, in their charge to the jury. A special entry is such a one, that if the surveyor, or any other person, was conducted to the place, where it is made, he would be able to see from comparing the calls of the entry, with the land in view, that it is the same land which the entry speaks of; and a certain description to a common intent is sufficient. But if the entry describe the plan intended to lie appropriated, as lying on a branch on the west side of a creek, we cannot understand that to be the same land, which is included in a grant, lying on both sides of the creek.

And if it be further said in the entry, to be on a buffalo path or road, leading down said branch from a clay lick, about two miles above said entry, the jury must be satisfied, that such a lick and path, are, or were in, and above the lands granted. If the grant conforms to the entry, it will be preferable to an intermediate grant, for the same land, upon a latter entry. But if it does not conform to the entry, it will not be entitled to such preference.

Overton J. An entry was directed by the legislature for the purpose of showing the surveyor, where the lands were.

Humphrey J. If it were certain enough to show the surveyor where the lands were, it would also show a subsequent enterer where they were, and indeed any other person, who might be concerned to know.

VERDICT FOR THE DEFENDANT.

COURT OF APPEALS. SOUTH CAROLINA.

SPRING CIRCUIT, 1811.

~~SPRING CIRCUIT, 1811.~~

The State *versus* Thomas Lehre.

[The following *unanimous opinion* of the Court of Appeals, on the doctrine of Libel—was delivered on the 21st of January 1811. At a special meeting of the gentlemen of the Charleston Bar, held on the same day, it was *Resolved*, That the Attorney General should be requested to apply to Judge WATIES, for a copy of the Opinion, with leave to publish it, as containing a truly legal and constitutional view of the doctrine it embraces. To this request the Judge acceded, and we are thus enabled to submit to the publick consideration a sound and eloquent decision, on a subject of the highest publick and private importance.]

WATIES, J. My brethren have assigned to me the duty of giving the opinion of the Court, in this case.

If it required a minute examination of the facts or principles, I should be unable, in my present state of health, to perform that duty; but the case does not require this; and the very full and able discussion of it, by the counsel on both sides, has rendered the task of deciding on it, still more easy.

The only question which requires any examination, is, whether the defendant had a right to justify the libel with which he was charged, by giving the truth of it in evidence.

It is not indeed, absolutely necessary, that I should consider, even this question. It would be sufficient to say, for it is the opinion of all the judges, that the right which is claimed by the defendant, has been exercised by him in the fullest extent; that all the facts which are thought material to his defence, were allowed by the prosecutor to be given in evidence—that notwith-

standing these, the jury have found his publication a libel; and that, therefore, there is no ground for the interference of this Court.

But as it is of importance, that the rule of evidence which has been made a question, should not be left subject to doubt in any future case, it is thought proper that I should also declare the opinion of the judges upon the law, in this respect.

It has been insisted on for the defendant, that in a criminal proceeding, as well as in a civil action, a party charged with a libel, may give the truth of it in evidence. His counsel have contended that, this was the general rule of the Common Law, which may be inferred from the Statutes of Westminster, 2 Rich. 2. and 1 and 2 Phil. and Mary, all of which provide for the punishment of *false tales* only, and that therefore the publication of "*true tales*," however scandalous and malicious, was not then punishable. This, I believe to be a correct construction of these statutes, as to all offences which come within them; but it does not follow from this, that they were declaratory of the only offences at Common Law, of the same nature, and that they recognize a common law right, to justify a libel, by giving the truth in evidence. The contrary may, I think, be fairly presumed; for, although on the trial of some offences under these statutes, the judges have said that the same were before punishable at Common Law, yet they do not say that it was not also a common law offence, to publish even "*true tales*," for a malicious purpose. These statutes, it appears, have proscribed new and more grievous punishments; it is most probable, therefore, that they only intended to punish in a greater degree, the publication of tales, which were aggravated by falsehood; and to leave the lesser offence to the common law remedy. This presumption is strengthened by the consideration, that all these statutes were made for special purposes. The first (Statute of Westminster) was made to suppress sedition. The Stat. of Rich. 2. was made to protect the great officers of the government; and the last, (1 and 2 P. and M.) was also made to suppress sedition.

But it is not necessary to explore the dark recesses of the ancient law, to ascertain this point. It has been ascertained for us

by those more eminently qualified than we are, for this great labour; by those who are our best guides in all our legal researches, and to whose steady and unerring light, we may more safely trust, than to any new lights of the present day. All the great expounders of the law, from Lord Coke, down to Mr. Justice Blackstone, have uniformly laid it down as a rule of the common law, that the truth of a libel cannot be given in evidence in a criminal proceeding; and this rule has never been departed from in a single instance. It is true, that a difference of opinion did, for some time exist among the English Judges, on the law respecting libels; but this was only the question, whether the Court or the Jury should decide on the criminal intent of the publication. The dispute was at last settled by the Stat. of 31 Geo. III. commonly called Mr. Fox's Act; and we think, correctly settled: for, we are all of opinion, that the statute was only declaratory of the old law. A jury has the unquestionable right to decide on the criminality of a libel, as far as the libel itself is the evidence of it. For this purpose, a defendant may read and rely on any part of it, to show an innocent motive and purpose in the publication; and this right was allowed to the defendant in the present case, in its fullest latitude.

But the law, at no time, and under no construction, has ever authorised a defendant, in a criminal proceeding, to justify a libel, by giving the truth of it in evidence. This has been invariably refused. It has been asserted, that the *first* case in which this was solemnly ruled, was decided in the Star Chamber; but as no case can be found, prior to that, in which it was otherwise ruled, it is reasonable to conclude, that this was not the creation of a new rule, but the observance only of an old one. And, even if it *did* originate in this odious and tyrannical court, yet it does not follow, that the rule itself is also odious and tyrannical.

The adherence to it by the common law courts, ever since, proves the contrary: they have given legitimacy to it as a common law rule; and its authority is further sanctioned by the justice and morality of its object. How many other rules are there of modern origin, and of less importance to the quiet and happiness of society, which are acknowledged to form a part of the common law, and from which we are not at liberty to depart?

It is a great error, to look to the first sources of the common law, for the purity of its principles. The best and purest of these, are of later accession. The sources of the common law, (except such parts as were derived from the laws of Rome) were shallow and muddy. In its downward course, it has been continually filtered and enlarged, by passing through courts of increased wisdom and science; and it is owing to these continued filterings and accessions, that we see it as it now is, a clear, wholesome, deep, and majestic stream. The most ancient decisions rest chiefly upon feudal principles, or upon reasons altogether barbarous and preposterous; these have been gradually disregarded; and we see more modern adjudications supported by such solid and rational grounds, that we may now say of the common law, with a very few exceptions, that nothing is law which is not reason.

But there is good cause to believe, that this rule did not originate in the Star Chamber, and was not the creature of that court. The rule was not peculiar to England: it existed long before. It made a part of the Roman law. We read in the pandects of Justinian, that "a defamer is not to be exempt from the punishment due to the injury, although the libel contain *nothing but what is true*. It is not permitted to make proof of facts, which are *secret*, and which have been the foundation of the libel." The same rule was adopted by a special edict of France, in 1561; and it is also to be found in the Constitution of the Emperor Charles V. in these words: "Though the defamation were grounded on *truth*, yet the defamer ought to be punished according to the power of the judge." (See Inst. Justin. lib. 4. tit. 4. 2 Domat. B. 3. tit. 12. and also, Bayle's Dissertation on defamatory libels.)

It is most probable then, that this rule was derived from the civil law. We know, that for many centuries, this was the law of all Europe; and England was governed by it for nearly 400 years. Although the barbarians who successively invaded and possessed that country, introduced into it many of their own laws and customs, yet the maxims and principles of the Roman law were too deeply founded in reason and justice, to have been ever disused; and there is no doubt, that they compose now a large part of the common law of England. The celebrated Sir William Jones, has

said, "the pandects of Justinian, are a most valuable mine of judicial knowledge. They give law at this hour to the greatest part of Europe; and, though few English lawyers dare make such an acknowledgment, the civil law is the true source of nearly all our English laws, that are not founded on a feudal origin." (Letter to the governor general of India, in 1786)

I hope that the authority of this enlightened and profound searcher into antiquity, will satisfy the objection which was made to this rule, if it should happen to be of Roman origin. But this is not only the law of England, and probably of all Europe; it is the law also of most of the free States of America. It is the law of New-York, (as appears in the trial of *Croswell*) even in the exceptionable degree which Mr. Fox's Act was made to correct. It was the law of Pennsylvania; because the constitution of that state makes an *exception* to it in libels against public officers. And it must have been the law of Connecticut, previously to the Act of her legislature in 1804, or that Act would not have been made.*

I have so far considered the case on the ground of authority, and it would be sufficient for us to decide it on that ground only; for we are bound to declare the law, and to give it operation, whether it be founded on good or bad reasons. But, as there does not exist in the whole system of our laws, a rule better supported by reasons than the one under consideration, and as the counsel for the defendant have contended that those are not applicable to the state of our society—it is proper that I should take some notice of the objections made on this ground. I think indeed that the multiplied instances of the general adoption of the rule in every state of society, and under every form of government, afford sufficient proof of its being a rule both of general policy and morality. But as this rule is more fully evinced by the reasons assigned for it by the commentators on our laws, I will proceed to examine these. In 5. Rep. 12. Lord Coke says, "a libel may be either against a private man or against a magistrate. If it be made against a private man, it deserves a severe punishment; for although a libel be against one, yet it excites all those of the same family, kindred or society to revenge, and so tends to quarrels and breaches of the peace, and may be the cause of the shedding of

* Not the law in Maryland.

"blood." He then proceeds to say, "it is not material whether the libel be true, or whether the party libelled be of good or ill fame; for in a settled government, a party grieved ought to complain for any injury done him in the ordinary course of law, and ought by no means to revenge himself either by libelling or otherwise." The same reasons for not allowing the truth of a libel to be given in evidence, are laid down in numerous other authorities; but I shall only refer further to Mr. Just. Blackstone. In his 4th book, 150, he thus states the law, "it is immaterial with respect to the essence of a libel, whether the matter of it be true or false, since the provocation and not the falsity is the thing to be punished criminally; though doubtless the falsehood of it may aggravate its guilt and enhance the punishment." "In a civil suit, a libel must appear to be false as well as scandalous for if the charge be true, the party has received no injury, and has no ground to demand a compensation for himself whatever offence it may be against the public. But in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace is the sole consideration of the law."

Here then we see it distinctly laid down, that although the falsehood of a libel, will aggravate the offence, yet the offence is complete without it; but a libel is an offence, not because it is false, but because it tends to provoke quarrels and private revenge, which is an usurpation of the public authority; that the objects therefore of punishing a libel, are to preserve the public peace and to enforce a due submission to the laws. Can it be seriously contended, that these objects are not applicable to our state of society? It appears to me, that every reflecting mind must allow that they are peculiarly necessary to a free government. The preservation of the public peace, and the prevention of private vengeance in any form, are the very foundation of civil liberty, which could not be said to be fully enjoyed, unless these great ends were fully secured. It is for this reason that the sending a challenge is a high offence. This too is punishable, only because it is a provocation to a breach of the public peace. It is also a public offence, to seize by force one's own property, because it is not lawful for any man to redress his own wrongs. If, therefore, a man forcibly takes

possession of his own land, he is punishable for a forcible entry. However manifest his right may be, yet he is not allowed to regain it by force, but must apply to the law for its aid and sanction. It would be in vain for him to urge the hardship of being punished for taking his own property. The law would reply, that he had done an act which affected the public peace: that it was his duty to refer his claim to an authorised tribunal, and to seek redress from the law. This reply may be fairly made to the reasoning of the counsel for the defendant in the present case. It was zealously contended that the publication of truth could not be a crime. But the truth makes no part of the essence of a libel; though the Defendant had proved his charges against the Prosecutor, yet this proof could not have availed him; he would, notwithstanding be guilty of having *provoked* a breach of the public peace, and of having usurped the public right by redressing his grievance in his own way, and inflicting punishment by his own measure.

These reasons for not allowing the truth of a libel to be given in evidence in a criminal proceeding are fully sufficient to justify the rule. But there is another reason for it, which will be thought by many to give more value to it than any other. It serves to protect from public exposure secret infirmities of mind and body, and even crimes which have been repented of and forgiven. Who will say that the truth of these should be given in evidence to satisfy or excuse the exposure of them?—A man may have been overcome by some strong temptation, and been induced to commit a crime which he has since abhorred; by a long perseverance in virtue and honesty, he made his peace with all who could be injured by it; and has thus a well grounded hope of obtaining pardon from his God. A woman, too, who may have yielded to some seducer, or even been the willing servant of vice, may have since become the faithful partner of some worthy man and the mother of a virtuous offspring, her frailties have long been forgiven, and she is in the enjoyment of the esteem and respect of all her neighbours.—Will any one say that these expiated sins may be dragged from the privacy in which they have been sheltered; that they may be presented to the view of an unfeeling world; be punished afresh by disgrace and odium, in which

innocent connexions must participate ; and that the author of all this misery may justify the act by showing the truth of the charges ! Shall he be allowed to disturb the sacred work of reformation, and rob the poor penitent of the blessed fruits of her repentance ? Justice, charity, and morality all forbid it : and thank God ! the law forbids it also.

There is one more ground in this case which requires some notice. It was contended that the publication of the defendant was the history of a judicial proceeding ; and therefore no libel.—There is no doubt that a true account of the proceedings of a court is no offence, unless it is intended to serve as a vehicle to convey slanderous charges, and to gratify a malicious purpose ; in which case it would be libellous, though true. But the publication of the defendant does not *profess* to be a report of a judicial proceeding. It expressly states, that the *design* is to expose the injustice of a decree of the court of equity, and the malpractice of the prosecutor, as a solicitor ; by imposing on the court and inducing a party to the suit, to swear to a falsehood.—Whether these charges were made with a malicious intent, or not, was a question for the jury, which their verdict has decided ; and there is no reason for ordering a new trial upon this ground.

Before I conclude, it is thought proper that I should state, that the delay which has occurred in the decision of this case, has not proceeded from any difference of opinion among the judges on the former argument, but from a desire that, in a case so interesting to the feelings and reputation of the parties, the subject should be fully considered before it was decided. The death of our late excellent brother, Mr. Justice WILDS, made it necessary that another argument should be had at this court, because Mr. Justice NOTT and myself were not present at the former one. The case has been now most amply discussed on both sides, and the opinion delivered is the unanimous opinion of the Bench, after the fullest consideration, and the most perfect conviction.

CIRCUIT COURT OF THE UNITED STATES.

NEW-YORK, 1811.

Livingston and Fulton vs. Van Ingen and others.

LIVINGSTON, J. THE complainants by their bill appear to be proprietors of boats on the Hudson river, propelled by steam, and claim a right to the exclusive navigation of the waters of New-York, in that way, in virtue of two patents from the United States, and several laws passed by this state. The defendants have built and are using a steam boat on the same river, for carrying passengers, and are building another for the same purpose, in violation, as it is alleged, of their rights under these patents and laws.

The bill prays, that the complainants may be quieted in the possession and enjoyment of these rights—that the defendants may be restrained by Injunction, from constructing or using these boats, on the waters of the state of New-York—and that the right of the complainants under their patents and the laws of the state may be established.

All the parties are citizens of the state of New-York, and no action has been brought at law to try the title of the complainants.

On the filing of this bill, a motion has been made to a judge at his chambers, for an Injunction to restrain the defendants from the employment of their boat.

The argument has been conducted with all the ability which might naturally be expected from the gentlemen concerned and the importance and novelty of the case.

The application is resisted on two grounds.—The defendants contend, 1st, That a Circuit Court of the United States, as a Court

of Equity, between citizens of the same state, has no jurisdiction of this cause. 2d. That if it had, this is not a case proper for its interposition in this way.

It will not be denied that the awarding of a writ of Injunction of this nature is one of the highest and most important functions which a Court of Equity can be called upon to exercise. The Court is asked to inhibit a party from the full use and enjoyment of his property, without any previous trial whatever; when that property is of a perishable nature, and must have been built at a very great expense, and when, if employed, it cannot fail of producing great gains; for the loss of which, however serious or extensive, the owners if eventually successful in the controversy, will have no remedy against any one: while the plaintiffs, if aggrieved, will be entitled to a three-fold recompense for any subtraction or diminution of profits to which they may for some time, be exposed. This too, it is expected, will be done without the previous institution of any action at law, and without the opportunity of any other proper mode of trial to decide on the matter which the defendants are authorised by law to allege in their defence. When process of such high import and serious consequences, is applied for, it becomes a Court, and still more a Judge at his chambers, to enquire with more than ordinary circumspection into his powers, and to stay his hand, unless he shall be fully and entirely satisfied of his jurisdiction. That the merits of the complainants are very great, and that they are eminently entitled to the favour of the public, and to every reasonable protection which government can afford, no one will deny. But when we are enquiring not into what ought, but into what has been done, considerations of this kind, however naturally or excusably they may be pressed upon a Court, can afford but little aid in coming to a correct decision.

A Judge of the Supreme Court may, in vacation, allow a writ of Injunction in those cases only, where it may be granted by the Supreme, or a Circuit Court.

That the Supreme Court, unless on appeal, has the power of awarding this writ, is not pretended. The examination, therefore, has been properly confined to the authority of a Circuit

Court. If then, the Circuit Court of this district, possess no jurisdiction over the cause, it follows, that the present application must fail.

This jurisdiction is denied, on the ground, that the parties being all citizens of the same state, they have no right to apply to the equity side of the court for relief by original bill, unless jurisdiction in such case be given by some act of Congress.

By the federal constitution, the judicial power is vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish, and extends to all cases in law and equity, arising under the Constitution and Laws of the United States, and controversies between citizens of different States. A further enumeration of its powers is not necessary for understanding the present question.

By the judicial act, the Circuit Courts have original cognizance concurrent with State Courts, of all suits of a civil nature at Common Law, or in equity, of a certain value, where the United States are plaintiff—or an alien is a party—or where the suit is between a citizen of the State where it is brought, and a citizen of another State.

By an act passed in 1800, *an action on the case*, founded on that and a former act, is given to a patentee, whose rights are invaded, to be prosecuted in the Circuit Court of the United States, having jurisdiction thereof, for a sum equal to three times the actual damage sustained.

But this being a suit in *equity*, it is asked by what authority it is brought here, unless the parties be citizens of different States? and much has been said of the impropriety of an inferior tribunal extending its jurisdiction to cases not particularly assigned to it.

If these courts be not inferior in the technical sense of the books, which they most certainly are not, they are so in some respects. They are not only so considered by the Constitution, but are in fact subordinate to the Supreme Court, and notwithstanding their high and responsible original powers, which extend to so many and such important cases, of a criminal and civil nature, and by appeal to admiralty and maritime causes, there can be no doubt that their jurisdiction is special and limited, both in regard to the

nature of the cases on which they can decide, and the character of the parties who can come into them. It is as certain, that they are indebted to Congress, under the Constitution, for their creation; and that instead of their extending their powers as the exigencies of suitors may require, or may by themselves be thought reasonable, they have hitherto been regarded as dependent on that body for all the powers they possess. Owing, as they do, their existence to Congress, from them must necessarily flow that portion of the general judicial power which, by the Constitution, they have a right to divide among the inferior courts that may be established. Thus constituted and organised, little would it become them to transcend a jurisdiction, which the constitution intended should be limited at the discretion of the legislature, and which Congress have circumscribed accordingly. While moving within their legitimate sphere, as marked out by the Legislature, they may hope to give satisfaction and to inspire confidence in the important department of government, of which they form a branch. It would seem then enough to say, that there being no act of Congress conferring on these courts, a right in any case, to take cognizance of a suit in equity, between citizens of the same state, this court can have no jurisdiction of the present cause which is between parties of that character. This seemed to be almost conceded, unless by the constitution there was secured to these courts, certain powers which might be called into exercise, without waiting for any special authority from Congress. To show that this was the case, it was said, that this being a case arising *under the Laws of the United States*, and being found in the constitutional enumeration of cases of federal cognizance, it must, whether allotted by Congress to a particular tribunal or not, be cognizable by one or other of the Courts which may be established. This argument proceeds on a supposition that the whole power of the judiciary must always reside somewhere, so as to be called into operation as occasions may require. If Congress had created inferior courts without any designation as to the cases of which they were to take cognizance, it is said, they would have concurrent jurisdiction of all cases mentioned in the constitution, except of those which were therein exclusively devolved on the Supreme Court.

That this, being a case of chancery cognizance, and the District Courts not possessing equity powers, must, *ex necessitate*, be triable where such powers exist, or that there will be a failure of justice—and the danger of permitting Congress in any way to abridge the objects of cognizance secured by the constitution to the judiciary, and through them, to the people of the United States, was expatiated on at some length. As Congress cannot add to those powers, it should not be admitted for a moment, it was argued, that they possessed the right of subtracting from them, or of permitting them to be dormant, by not legislating sufficiently. Without stopping to enquire, whether there be any ground for these apprehensions, or denying any weight to the argument, it will not be deemed disrespectful to the counsel who advanced it, if it is not thought necessary to examine the course of reasoning from which this conclusion is presumed to follow, because, on this point, we are not without authority. The Supreme Court has decided, and after an argument, which, if we except the one to which I have just had the pleasure and the honour of attending, has perhaps, never been surpassed on any occasion—that if jurisdiction of cases arising under the laws of the United States, be not conferred on the Circuit Courts by an act of Congress, they cannot take cognizance of them. The case of the Bank of the United States against Deveaun, is here referred to, which was decided in February term, 1809, a report of which is not yet published.

It was there made one question, whether a right was conferred on the bank to sue in these courts by its act of incorporation, or any other law of Congress.—It was decided not only that the circuit court derived no jurisdiction over a case under the laws of the United States from the judicial act, that class of cases not being provided for by it, but that from the law which incorporates it, the bank acquired no right to bring an action in those courts, although there were expressions in that act, which it was very strangely insisted on, gave it to them. In support of this decision, if it required any to render it binding, reference might be made to a coterminous exposition of the constitution, by the great and wise men who composed the Legislature that organized the ju-

diciary, and to what appears to have been the understanding of Congress from that time to the present day, for whenever it was intended that these courts should take organization of a case arising under any law of the United States, such power was expressly delegated to one of the federal courts; Congress well knowing that the judicial act was silent on this point and not supposing that any such power by the constitution was given to the circuit court.

This too may be collected from an act passed in 1800 which, in terms, gave to the courts then erected, jurisdiction over this class of cases, but which act, being afterwards repealed, although not on account of this clause, left us as before, without any general provision on the subject. If other evidence were wanting that the supreme court had not fallen into so great an error, as it was thought to have done by this decision, it might be collected from the journal of the senate of the United States. There we find that the judicial act was prepared by a committee consisting of a member for each state, most, if not all professional men, and it cannot be believed that, in a line drawn with so much care, and embracing such a variety of provisions, so important an omission was casual. It must have been the result of much reflection, and shows their sense at least, that Congress were not bound to clothe the courts which they might create with all the powers which by the constitution they had a right to confer.—When it is recollected that three gentleman of this committee were afterwards judges of the United States, an allusion to what must have been their opinion when senators, on a point immediately under their consideration, cannot be thought improper. The same principle is recognised by the very laws under which the plaintiffs claim, for the judicial act not having made any provision in such a case, unless the parties were citizens of different states, it was thought necessary to establish, by those acts, the rights of a patentee to sue in a circuit court, but at the same time, such right was restricted to its legal form—as it regards this case then, the legislature is not chargeable with any omission, or with affording a remedy, without a designation of the tribunal, which was to administer it, for although by the constitution the judicial power is extended to all cases in law and equity, arising under the law of the

Union, congress may certainly say that the relief which they intend to afford in a particular case shall be at law only. If it had been thought proper to proceed at law in this court, the complainants would probably have found no difficulty on the score of jurisdiction, and it may be added that if this case be of equity cognizance at all, (which has been strongly controverted and on which no opinion is given,) it is probably so at common law, and in that case Congress were not bound, even if it had the right to give jurisdiction of it to any federal court.

It was further urged in favor of the present jurisdiction, that the supreme court of this state, has decided that an action cannot be maintained there, founded on the patent laws of the U. States, and that as the court of chancery of the State would give no relief, the parties thus excluded from the federal and state courts, would be without redress, if the decision of the supreme court of the United States were considered as applying to them. It is not for me to say what the chancellor of this state will think his duty, if a similar application be made to him—but if this be a case of equitable jurisdiction at common law, as it was sometimes alleged to be by the complainant's counsel, no objection is perceived to his taking cognizance of it. But should he think otherwise, there is still another answer to this difficulty, which is, that if the parties be remediless, it is no fault of the law, which gives them if not a perfect, at least a liberal, and what will probably prove, if they choose to pursue it, a very effectual remedy; for it is not to be believed, as was supposed at the bar, that they will have to bring action after action to establish their right. Let them proceed in only one trial at law, and the defendants will not be hardy or foolish enough to continue on very unequal terms, what will then be settled to be a violation of their patent rights—such a verdict will forever after keep all intruders at a distance. But, if absolutely without remedy elsewhere, it does not follow that this court can help them. A court, constituted like this, is not to reason itself into jurisdiction from considerations of hardships, when a plain and safer rule is prescribed by the supreme court, which is to examine on all occasions, what powers are committed to it by the laws of the U. States.

Another argument, which it may be expected, will be noticed, was, that as an action at law, under the patent acts, may be prosecuted in this court, even between citizens of the same State, there was necessarily conferred on it a right to hold jurisdiction of the present bill; for as the Court possessed equity powers in virtue of the judicial act, it was possible to give it jurisdiction as a Court of Law, without at the same time calling into exercise, its powers as a Court of Equity. If it becomes necessary in an action at law, regularly before it, for either party to appeal to its equity side, in aid or defence of such action, such application might not be improper. But this is not a bill of that kind. It would, by the action at law in such case, on which its jurisdiction would attach. But the answer to the argument is, that by the judicial act no equity powers are given to this Court, *between citizens of the same state*; and it results from the decision which has been cited, that a Circuit Court must not only confine itself to the case defined by Congress, but that if by a particular act, it is authorised to proceed in the given case as a Court of Law only, a party must come into it on that side, to bring himself within the provisions of it.

There being then no law, conferring on this court a right to take cognizance *as a Court of Equity of cases of this nature, between citizens of the same state*, my opinion is, that this court cannot entertain cognizance of the present bill, and that the plaintiffs, therefore can take nothing by their motion.

After this decision, it would be superfluous and improper, to express any opinion on any other of the important points which were made on the argument of the present question. If the parties were citizens of different states, it is not intended to say, that the plaintiffs would, or would not, be entitled to the equitable relief which they seek.

GENERAL COURT. VIRGINIA, 1811.

The Commonwealth *against* Samuel Myers.

An adjourned case, from the Superior Court of Law, for Norfolk county.

WHITE, J. *Samuel Myers* was indicted before the Superior Court of Law for the said county, for wilfully, maliciously, and of malice aforethought, killing and murdering *Richard Bowden*.

Being arraigned at the bar, he pleaded three pleas in bar of the indictment. In substance—

First, That he had been acquitted by an examining court, duly constituted, of the murder for which he stood indicted, as afore-said—

Secondly, That he had been acquitted by an examining court, duly constituted, of the murder charged upon him by the said indictment, and remanded to take his trial for manslaughter, committed by killing the said *Richard Bowden*.

Thirdly, That he had been acquitted by an examining court, duly constituted, of the murder and felony, charged upon him by the said indictment.

To all these pleas, the attorney prosecuting for the commonwealth, demurred generally; and Myers joined in demurrer—And because that court was not advised, what judgment to give, of and upon the premises, and considered the questions arising therefrom, and particularly two, which are specially stated, both new and difficult; it, with the consent of the said Samuel Myers, adjourned the said questions, particularly stated, and all and every other question of law, arising *upon* the said pleadings, to this court.

By the tenth section of the Act concerning the General Court, and the sixteenth section of the act establishing the late District Courts, those courts had, and of course the Circuit Courts now have a right, with the consent of the prisoner, to adjourn any question of law arising in a criminal case, to this Court, to be argued and *decided* therein.

The power of this court on such adjourned cases, is derived altogether from those sections, and cannot be carried beyond a fair and liberal construction of them. We cannot, therefore, decide any question, which may grow out of the record before us, unless it plainly appears upon that record, liberally construed, that the Circuit Court intended to ask our opinion upon such point. Therefore, as the questions submitted to this Court are ; First, Those especially stated ; and, Secondly, Those that arise *upon* the pleadings, any questions which did, or might have arisen in the Circuit Court, before the making up of those pleadings, are not before this Court.

However, as questions of that kind have been argued with great ability, by the gentlemen on both sides, and as they seem to be in some measure connected with those actually submitted to us, the Court will not withhold its opinion upon them.

First, It is alleged by the Attorney General, that a prisoner cannot plead more than one plea in bar, if the pleas offered to be pleaded be, in contemplation of law, repugnant to each other.

Secondly, That the record pleaded in each of these pleas, or a certified copy thereof, ought to have been produced to the Court, to enable it to see that such a record did actually exist, and that in point of law, it offered a complete bar to the indictment. Although these points are somewhat connected with the questions submitted to us, and very important in their nature and consequences, yet it is believed that they do not arise *upon the pleadings*, as they stand upon this record. How can they be taken advantage of upon a demurrer. The demurrer confesses the truth of the pleas. Suppose then for the present, that these pleas are otherwise good, and offer to the Court substantial bars to the indictment ; Can any thing be more monstrous than to say, that a man shall be hung, when the attorney has confessed upon the record, that he has

three different matters of defence, either of which, although they may appear somewhat repugnant, is sufficient in law to forbid it? Or, that he shall forfeit his life for not producing a record, the existence of which the attorney hath in like manner confessed? Besides, as to the repugnancy, how can the Court perceive it? This demurrer must be considered as a demurrer to each plea, and considering it as such, the Court cannot, when applying it to one plea, look into any other. But as to the first of these points, 2 Hale, 239, 248, and 2 Hawkins, 276, 277, sec. 128—the same book, 283, sec. 136, are complete authorities to show, that although a person indicted of a capital offence, may not plead two pleas, deemed by law repugnant, in abatement, yet with respect to pleas in bar, when the Court is satisfied of their truth and efficacy, although they may appear somewhat repugnant, if they do not directly contradict each other, he shall be indulged. For what two pleas, not absolutely incompatible with each other, can be more repugnant than *Auterfoit's Convict*, on the prisoner's own confession, and not guilty? Yet, when we recollect how often ignorant and timid men have been coerced or deluded to make such confessions in open court, (as for instance in the case of Witchcraft) we shall admit not only the humanity, but the justice of the indulgence.

As to the second of these points, the allegation of the attorney, as now modified, seems to be correct; but cannot avail at this time, in this court. Speaking of the plea of *Auterfoit's Acquit*. 2 Hale, 241, says, "Stamford tells us, that the prisoner need not have the record of his acquittal *in poigne*, because the plea is not dilatory but in bar:" "But," adds Hale, "if that should be law, it would be in the power of any prisoner to delay his trial as he pleaseth, by pleading *Auterfoit's Acquit* or *attaint*, in another court, and so put the King to reply *nul tiel record*, and then day given over to the next gaol-delivery to have the record, &c. For regularly, if a record be pleaded in bar, or acted upon in the same court, the other party shall not plead *nul tiel record* but have *Oyer* of the record; but if it be in another court, he shall plead *nul tiel record*, and a day given to procure the certificate of the record; or the tenor thereof: But it seems, that for the avoiding of false pleas, and surmises, and to bring offenders to speedy trial in ca-

pital cases, the prisoner must show the record of his acquittal, or vouch it in the same court." He then proceeds to show how either may be done.

The first he tells us may be affected by having the record removed into chancery by *certiorari*, and having it in *poigne*. Or by having it sent to the justices *sub fide sigilli*, and it then goes on to say, if the trial is in the King's Bench, the second may be done, by the court's granting, "a writ of *certiorari*, to remove the record before that court, in which case the court will respite his plea until the record is removed, that he may form his plea upon it, for the record is a part of his plea, thereupon his plea is put into form, setting forth the record in certain, (as the attorney general has said, ought to have been done in this case) by saying, *for this he voucheth the record of the acquittance aforesaid—At the command of the King himself sent before the King, and now before the King remaining.*" So that the amount of the authority is, that to prevent delay and false pleas—whenever the plea of *Auterfoits Acquit*, or *Auterfoits Convict*, in another court is pleaded, the prisoner shall be ready to prove on the spot the truth of his plea, so far as it respects the record of the former trial. For the record is a part of his plea, and the truth of that must be proved to the Court, by a transcript of the record duly certified, or the record itself properly brought before the court, and that if this proof is not instantly given, the court will overrule the plea, although for good cause shown it will give him time to plead until the record can be procured.

There is then no doubt with the court, but that the transcripts of the records pleaded, or the records themselves ought to have been produced to the circuit court when these pleas were pleaded—Nor can the court doubt that they were so produced, not only because the court did not overrule the pleas for want of them, but because the Attorney has demurred to the pleas and thereby admitted their existence.

Having disposed of these preliminary points, it seems most proper to take up the questions actually adjourned, in the order in which they are presented by the record.

The first of these questions, a question which involves considerations of the utmost importance to the criminal jurisprudence of this country, as well as the second plea contained in this record comes before us in this shape.

“Whether a court of examination hath power to acquit a prisoner charged before them with murder, of the murder with which he stands so charged, and to remand the said prisoner to be tried in the superior court, for manslaughter, on account of the same homicide?”

Before we enter upon this subject, it may be necessary to observe that the attorney-general has never asserted, nor has it entered into the mind of any member of this court, either that the circuit courts possess an appellate jurisdiction over the decisions of the examining courts, or that any court whatever has a right to annul or disregard the unreversed judgment of another court, be it never so erroneous, when brought incidentally before it, if such judgment was within the jurisdiction of the court which pronounced it. The positions laid down by the attorney-general were these: ‘That the discriminating power contended for is not given to the examining courts either expressly, or by implication, and is not within their jurisdiction. And that not being within their jurisdiction, if they do attempt to exercise it, their decisions, as to that, are merely void, and binding upon nobody.’ And surely if the premises are correct, the conclusion cannot be denied.

When entering into the consideration of this important question, it is necessary to premise that these courts of examination are courts unknown to the common law: That they are the mere creatures of the statute law, and cannot upon any principle, exercise any power or jurisdiction which has not been expressly conferred on them by that law, or which does not result to them as the means necessary to carry the jurisdiction expressly given to them into effect—These powers they do and must possess, but no more.

What then is the statute law upon this subject? What are the powers which it hath given to these courts? And what other powers are necessary to the due exercise of the powers given?

Has the statute law given to these courts, as it has to the county and corporation courts, with specific exceptions, 'jurisdiction to hear and determine all causes whatsoever at common law, or in chancery, within their respective counties and corporations'? Or has it given to them as it did to the district courts and of course now gives to the circuit courts, "Full power to hear and determine all treasons, murders, felonies and other crimes or misdemeanors whatsoever committed or done within their districts?" It is believed it has not. Let us look into the acts of assembly and see :

By an act passed on the 24th of January, 1804, 2nd vol. of the Revised Code, page 36, chapter 34, section 1, it is enacted, "That from and after the commencement of this act, when any person not being a slave, shall be charged before a justice of the peace with any treason, murder, felony, or other crime or offence whatever against the commonwealth, such justice shall take the recognizance of all material witnesses &c. And moreover, shall issue his warrant to the sheriff of the county or sergeant of the corporation, requiring him to summon at least eight, if so many there be, of the county or corporation, to meet at their courthouse on a certain day, not less than five nor more than ten days after the date thereof. To hold a court for the examination of the fact—which court consisting of five members at least, shall consider whether, as the case may appear to them, the prisoner may be discharged from *further* prosecution, or may be tried in the court or corporation, or in the district court, and shall thereupon proceed in the manner as prescribed by the act, entitled an act, directing the method of proceeding against free persons charged with certain crimes." &c.

Let us stop here and enquire, whether this section gives to the examining court general jurisdiction over the fact and offence charged upon the accused? Surely it does not. It has not general jurisdiction over the offence unless it can hear and determine it—which no person will pretend to say it can do. For the moment it has decided that an offence has been committed by the prisoner, it becomes his duty to send him to another court for trial. Its jurisdiction, then, must be limited. Let us see to what it is lim-

ited. What can this examining court do? So far as this section is concerned, it can do one of three things—First, it is to consider whether the prisoner may be discharged from further prosecution. If the court thinks so, he is discharged accordingly, and there is an end of the matter—But if the court does not think that he ought to be discharged from *further* prosecution, is it authorised to entertain that *prosecution further*, to go *further* with the examination of the fact? it is not; on the contrary, in that event, the court is expressly directed to enquire, in the second place, in what court he may be tried, or in other words, further prosecuted—And having ascertained that, the court is expressly directed in the third place, in pursuance of the act to which the section now under consideration refers, to take proper measures to bring him before that court for trial. It is believed that this is a correct statement of those statutes, and if it be so, is it possible not to perceive, that, as the attorney general has observed, the power to discharge *from further* prosecution and the power to remand *for further* prosecution are contrasted with each other? That the latter is not intended to be, and in fact cannot be, exercised until the court has decided that it ought not to exercise the former?

As, however, the great weight of the argument in favor of this discriminating power, rests upon the true import of this authority, to discharge from further prosecution, let us examine a little more minutely, what is the natural, correct and necessary meaning of the phrase, *discharge from further prosecution*. Let us then suppose that a man is charged before a justice of the peace, with breaking and opening a house, and stealing a pocket handkerchief, the justice being of opinion that the offence amounted to burglary, commits him for that offence, and summons an examining court. But that court after hearing all the evidence, is satisfied that although the crime was committed, it did not amount to burglary, but to petty larceny only. Or let us suppose that a man is, in like manner, committed for a grand larceny, and the examining court should think him guilty of the fact, but that it amounted to petit larceny only—What would be done with these men? They would be remanded for trial in the county court—Here is an exercise of the discriminating power, but is there a

man alive who can prevail upon himself to believe that there is a discharge from *further prosecution*? Or that it proceeds from, or is done in consequence of the power to make such discharge? so far from being so, it is an express order that he *shall be further* prosecuted, and is derived, as will be shown hereafter, from a different source. How then does this power to discharge from further prosecution prove, that the examining court, when it has refused to exercise it, and has actually sent the accused to another court for trial, has a right to forestall the opinion of that other court in which the law and its own decision has said that trial ought to take place?

But it is said, the major includes the minor, that the power to discharge from further prosecution is the major power, the power to discriminate the minor, and of course included in the other.— But it is believed, that the power to acquit generally, is not the major, but the minor power. It is believed, to be a self-evident truth, not to be denied by any man conversant in the law, that the power to ascertain the various shades and grades of an offence, which has been committed, is a power infinitely more difficult to execute, and more important in its nature and consequences, than the power to decide, whether any offence whatever has been committed, and this is more emphatically true, as it respects the crime of felonious homicide, than any other. How then can it be said, that the former is a major, and the latter the minor power? It is believed, that the converse of the proposition is true.

But it is further said, that these courts have and do exercise the power of discriminating between the grades of certain offences, as for instance, those which have been mentioned, burglary and larceny. And this is true, but it is not easy to see how it affects the argument—no one doubts but that they may do any act necessary and proper for the due exercise of the power actually given to them. They are expressly directed to send the accused, to the court in which by law he ought to be tried, but, in these cases, it is impossible to ascertain in what court the trial ought to be had without first ascertaining whether the offence be or be not petty larceny, and so far they may and must discriminate. But how does that prove that in a case not necessary to the exercise of a

power actually given, they may discriminate for the purpose of interfering with the opinion of that court to which, by direction of law, they send the prisoner for further trial.

We are also told that this power is given by the third section of the act of 1804. That section enacts 'that if any person charged with any crime or offence against the commonwealth shall be acquitted or discharged from further prosecution by the court of the county or corporation, in which the offence is, or may by law be examinable, he or she shall not thereafter be examined questioned or tried for the same crime or offence; but may plead such acquittal or discharge in bar of any other or further examination or trial for the same crime or offence, any law, custom, usage or opinion to the contrary in any wise notwithstanding?'

Now upon what principle of construction can this section be said to give a power to acquit or discharge? Is it not most clearly and palpably predicated on the idea that the power had already been given? And is it not manifestly intended to declare what shall be the result of that acquittal or discharge which the court already possessed a right to pronounce? To find, then, the extent of that power to acquit or discharge, we must look into that part of the law which gives it. And when we do so, we discover it is this very power to discharge from further prosecution, out of which the present question has arisen, and which, it is believed, has already been proved not to confer the discriminating power contended for.

But the construction put upon this section is attempted to be further supported, by stating, that any person charged with a crime or offence, who is acquitted or discharged by the examining court, shall not be questioned for the same crime or offence, and then stating every degree of a crime which grows out of an unlawful act, as forming by itself a separate and distinct crime or offence, although they are alleged to grow out of the same unlawful homicide. And that therefore, if the examining court acquit a man charged before it with murder, but go on to say, that he is guilty of manslaughter, by perpetrating the same felonious homicide for which he was charged with, the murder, he is thereby acquitted of the crime he stood charged with, to wit, the

murder ; and may plead that acquittal in bar, by virtue of the 3d section. But this is an incorrect understanding of the words crime and offence, as they are used, both by the common law and the statute under consideration. In legal acceptance, those words are synonymous terms, although the word crime is often used to denote offences of the higher grades. 1 Hawk. page 1, Black. Com. p. 4 and 5. In the same 5th page of 4 Bla. Com. we are told, that crime consists in doing an act, in violation of a public law ; and in the 2d page of the same book, that the law teaches the *grades of every crime*, and adjusts to it its adequate and necessary punishment. Crime or offence, then, is the doing an act, in violation of a public law ; and the different degrees of atrocity which may attend its commission, fix the degree of the crime. The killing of a human being, in any case not specially allowed or excused, is a crime distinguished by the name of felonious homicide. But as that crime may be attended with greater or lesser degrees of guilt, those degrees are distinguished by different names and punishments. But still they all constitute the same crime, felonious homicide. And murder being the highest grade, includes all the others. So that a man charged with murder, is charged with every species of felonious homicide. Blackstone, after having in his fourth volume, disposed of sundry crimes, of a different nature, comes as he says, to consider " those crimes, which in a more particular manner, affect or injure individuals."

And in the 188th page, he proceeds to consider the *crime of felonious homicide*, that " being, as he says, the *killing* of any human creature, of any age or sex, without justification or excuse, and this, he adds, may be done by killing one's self, or another man." He then goes on to describe the various species of that crime, and their respective punishments, clearly showing, that in his opinion, felonious homicide was the crime, and murder, manslaughter, &c. &c. its various grades.

The meaning put upon these words by the statute under consideration, is precisely the same. When any person is charged before a justice of the peace, with treason, murder, felony, or other crime or offence, he is to summon a court to enquire into the fact, which is supposed to constitute that crime ; when the court has

done so, it is to consider whether he may be discharged from further prosecution. For what? For every species of crime which might grow out of that fact. If they do not discharge him, they are to send him to the proper court to be tried. For what? For another offence. For a crime which does not grow out of the fact, to enquire into which the court was called! Certainly not; it must be for the *criminal act*, or in other words, the *crime* charged upon him by the commitment and summons which constitute the court, and no other; and yet they will send him to one or other of the courts, as the circumstances attending that fact, make the crime with which he is charged, more or less atrocious; as for instance, grand or petty larceny. By crime then, this law does not mean each separate grade of an offence, but the criminal act itself.

This it is believed, gives a satisfactory answer also, to the argument drawn from the interpolated reading of the various sections of this act.

The Court does not see the force of the argument drawn from the supposed tautology, which it is said, the construction contended for by the Attorney General, will produce. The expressions, acquitted, or discharged from further prosecution, were introduced into the third section very properly, out of caution, and are calculated to meet an argument pressed upon the court in this very cause; to wit: That if an examining Court should say, that a prisoner is not guilty and actually turn him loose, yet if it does not go on and say on the record, he is discharged from further prosecution, he may be prosecuted *de novo*.

The argument from analogy is also deemed inapplicable.—The Grand and Petty Jury are sworn in a court, having general jurisdiction on the crime, and are by the statute and common law charged with every part of it: Not so the examining court; we have seen that its jurisdiction is limited.

Besides, it is not correct to say, that a grand jury can acquit. It is true, if they find *ignoramus* as to the murder, and a true bill as to manslaughter, the attorney cannot try the prisoner for murder on that bill. But if he obtains better testimony, he may send up another bill for murder, and try him upon that. One indictment cannot be pleaded in abatement of another, 2d Hale 239—

nor can the return of *ignoramus* be pleaded in bar. It is said, that he will not be prepared to encounter the charge of malice, and therefore, will be taken by surprise. The answer is, that this can never happen, if the court send him up generally, for the homicide, as it ought to do.

“But the examining Court is an additional barrier, erected for the benefit of the accused,” and so it is. No innocent man can now be kept in jail more than ten days, without a trial. And if his examining Court discharges him, he can never afterwards be questioned for the same crime; two great privileges which he did not enjoy by the Common Law. The inference drawn from the power to bail, stands on the same footing with that drawn from the power to discriminate between grand and petty larceny. It may not be improper, however, to add here, that this power to bail, was not given to the examining courts at the time, nor for the reason mentioned in the argument: those courts have possessed that power ever since the year 1777. Vide Chancellor’s Revisal, chap. 17. sect. 58. p. 74. The history we have had of this law does not, it is believed, impugn, in the least, the construction given to it by the Court. From the passage of the first act upon the subject, up to the year 1786, we knew of no judicial decision upon this point. For although Judge Mercer did, in the discussion of Sorrel’s case, mention the case of the King against Davis, yet he did not make *even* a parol report of the circumstances of the case. He did not tell the term, not even the year, when it was adjudged, nor, which is very remarkable, did any of his brother judges, not even the judge who agreed with him, rely upon it, or mention it in their arguments—such a vague account, from mere memory, at a distant day, cannot be considered as authority, especially, as it was not so considered by the Court, to whom it was mentioned.

Sorrel’s case then, was, so far as the Court can know, the first that has occurred upon this point, and that case settled the law, as now contended for by the Attorney General. This was the opinion of the General Court, and not one of its branches, and it is a mistake to say, that Judge Tazewell gave no opinion. He did give a pointed and able one. It is true, he added, if the question was

moved again, in arrest of judgment, he would be *willing to hear it* argued.

Neither was this a sudden opinion, given without consideration. The question was moved upon the fourth day of the Court, when the indictment was sent up to the Grand Jury. It was again discussed and decided on the sixth day of the court, when the prisoner had his trial.

This construction has, as we are told, been sustained by the District Courts in Bailey, and Shannon's cases. So that there have been three judicial opinions in favour of it, and none, that we know of, against it.

From the year 1786, to the year 1804, (eighteen years) the Legislature left this law, thus explained and thus executed, untouched. If it had deemed this construction incompatible with the public good, would it have done so? Certainly it would not.

In the year 1804, the Legislature did pass a new statute on the subject of Examining Courts. But was it moved to do so, in order to give them this discriminating power? If that was its intention, why did it not do so in express words? Why was it left to intendment and doubtful construction? The Legislature knew that this power had been denied to the examining courts for eighteen years, why then did it not put the question beyond doubt? For the best of all possible reasons, it did not intend to disturb it.

The truth is, that all the judges who sat in Sorrel's case, and most of the judges and lawyers in the state, had always admitted that these courts did possess the power of entire acquittal. This opinion, however, had lately been called in question by a book of respectable authority, and had in Shannon's case been actually resisted by a judge of the General Court. It was then to put an end to that question, and to secure to those courts that general power of acquittal which almost every body thought they did possess, that this third section of the act of 1804, was inserted.

Another argument was pressed upon the court in a late stage of the cause drawn from the 12th sect. of the penitentiary statute.— It will not however be contended, that if the legislature pass a law upon a supposition that that is law which is not, this mistake will

be equal to an enacting clause and call a new law into existence—if then the examining Courts did not before possess this discriminating power, this section could not give it to them.

But it is a mistake to suppose that when the legislature speak of a person's being charged with a crime, a charge made by a grand jury or examining court is necessarily meant. The word charge is often used to designate a charge made upon oath before a justice of the peace, and it is so used in both of the acts of assembly respecting examining courts.—The real intention of the legislature seems to have been, that when a man was sent forward for homicide, and the attorney, to whom the law directs the depositions to be sent, should perceive that the evidence charged him with involuntary manslaughter only, he should be at liberty to proceed in the manner pointed out by that section.

Upon the whole, the court is unanimously of opinion that a court of examination hath not power to acquit a prisoner charged before it with murder, or the murder with which he stands so charged, and to remand the said prisoner to be tried in a superior court for manslaughter on account of the same homicide ; and that if such court does make such a discrimination, the prisoner is not thereby discharged from any part of the felonious homicide with which he stood charged but may be indicted for murder before the superior court.

TO THE EDITOR.

Can any case be cited where women have obtained a parliamentary or legislative divorce *a vinculo matrimonii* from their husbands for infidelity ?

Can an instance be produced of a conviction and execution for MURDER by DUEL, where the party has behaved according to the generally received maxims of honour ?

CIRCUIT COURT. VIRGINIA, 1811.

Livingston *versus* Jefferson.

IN TRESPASS QUARE CLAUSUM FREGIT.

Demurrer on a Plea to this Jurisdiction.

TYLER, J. This case, although so ably and elaborately argued on both sides, affords but a single question; and that may be drawn within a narrow compass; and while I freely acknowledge how much I was pleased with the ingenuity and eloquence of the plaintiff's counsel, I cannot do so much injustice to plain truth, as to say, that any conviction was wrought on my mind, of the soundness of the arguments they exhibited in a legal acceptation. It is the happy talent of some professional gentlemen, and particularly of the plaintiff's counsel, often to make "the worse appear the better cause;" but it is the duty of the judge to guard against the effects intended to be produced, by selecting those arguments and principles from the mass afforded as will enable him to give such an opinion at least, as may satisfy himself, if not others. These arguments and this eloquence, however, have been met by an Herculean strength of forensic ability, which, I take pride in saying, sheds lustre over the bar of Virginia.

But to proceed in the examination of the point before us; and that is, to enquire, whether this court has jurisdiction over this cause? And how it comes to be made a question at this day, I confess myself entirely at a loss to say; but as it is made, we must determine it.

By the Common Law, which was adopted by an act of convention of this State, so far as it applied to our Constitution, then formed, this point has been settled uninterruptedly for centuries past, and recognized by uniform opinion and decisions, both in England and America. It is true, the great luminary of the judicial department of Great Britain, did make an effort to shake the principle they had established; but the judges in that country, would not suffer it to be unsettled, it having been so long acknowledged as the indubitable law of the land. Nor was it for them—nor is it for us, to be over scrupulous in enquiring for the reasons on which the opinion was originally given, why an action of *trespass* should be deemed a *local* action.

Time may have cast a shade over the reasons of many maxims and principles; and yet they are principles and maxims much to be respected. But to me, some appear to be evident; for instance, in this action, the title and bounds of land may come in question: and who so proper to decide on them as one's neighbours, who are so much better acquainted with each other's lines, and every thing else which may lead to a fair decision? In an action of this kind, it may be necessary to direct a survey and lay down the pretensions of both parties; for, the defendant has a right to show in himself, a better title, and defend himself on that title. He calls for a direction from the Court for this purpose, and if it goes at all, it must go to an officer to carry his posse to remove force, if any should be offered. And suppose the sheriff and jury should deny the power of the Court, could they be coerced? And is not this an undeniable proof of the want of jurisdiction; since, although we should sustain the cause in court, by a sort of violence against principle, we should not be able to complete what we begun? The law never sanctions a vain thing. How vain, therefore, to begin what we cannot end! Is not this enough to show the locality of the action, and the consequent want of jurisdiction?

I shall not attempt to travel up to the time, when both real and personal actions were local. This has been sufficiently done—though perhaps not necessary—by gentlemen at the bar, nor shall I enquire when the distinction took place between local and transitory actions. It is enough to say, that, notwithstanding this

distinction, the action for trespass, *Quare Clausum Fregit*, still remained local, and is so held to this day. The jury of the vicinage was, and still is, a valuable privilege in both cases. May it not be true, that when Great Britain had emancipated herself from her insulated state, figuratively speaking, by spreading her canvas, and carrying her commerce over every clime and every region, this change, this distinction soon followed after it, so as to give greater energy to the transactions between man and man; therefore, by a fiction in law, suffer a transitory action to be maintained any where and every where, in which a contract could be made.

But some how or other the court must have jurisdiction of every cause it attempts to sustain; and I can conceive no better scheme than that which is pursued, of giving the court jurisdiction by a fiction in transitory actions in this way; that a contract for instance, was entered into in New-Orleans, to wit, in the city of Richmond, between the parties, (not traversable but in case of jurisdiction,) from which city or the county in which the city is, the jury must come. I say must be supposed to come, notwithstanding the act of assembly which requires the bystanders to be summoned, for they are of the county or vicinage; and this act saves the necessity of *venire facias* in every case. The venire therefore is indispensable in my opinion to show jurisdiction.

Again, I well recollect a case of Waste brought in the Petersburg district court, when the county of Greenville was supposed to make one which composed that district. The cause went on to trial and a verdict passed for the plaintiff, without its being observed that Greenville belonged to Brunswick district; but at length the defendant's counsel found it out, and moved in arrest of judgment; but the verdict was sustained; an appeal was taken, and the high court of appeals reversed the judgment, because, it being a local action, it ought to have been instituted in the district where the trespass was committed over which that court alone had jurisdiction—notwithstanding a verdict had passed upon the general issue, and it often has been determined that no consent of the parties by their pleadings could prove jurisdiction. Various are the causes which have been determined in this

country, in support of the doctrine laid down in this cause, and not one to the contrary, I venture to affirm can be adverted to.—

Why then attempt to alter this settled principle? Has any statute been passed in this country, that in the slightest manner disturbs the uniform decisions? The case I have referred to was between Gall and Thweatt; and I own is a strong one, as the place wasted and recovered was to have been delivered up, and the court had no power to enforce the judgment. But I have given reasons enough to show how inadequate would be the power of this court to carry on the cause before us and enforce the judgment.

It seems clear then, that where title of land is in question, the action must be local, notwithstanding, what may be and has been said of a contract to convey land: I well know there is a legal and moral obligation on every man to perform what he contracts to perform, and this among others, is a reason why an action personal should follow a person wherever he might be found, and there rise in judgment against him.

Upon the ground taken, so far then, the action cannot be maintained in this court; but the ingenious counsel, never at a loss for argument and new matter, has resorted to what he calls the general, the universal law. Now, I want to see this undefined law, before I can sustain a principle under it. I suppose what is meant by the general or universal law is the law of nature and nations—and who yet has been able to find where the law of nature has defined what a civil action is, or directed the mode of proceeding in it, or in what court it should be brought. These are high sounding words indeed, but they only serve to round a period and fill up a vacuum in the argument. This is something like the last resort of kings, when every thing else fails; for, I know of no other *actions* in that quarter, but such as flow from that *source*. Neither do I know of any law that can change the locality of a man's land in New Orleans, to the city of Richmond. This mighty engine, therefore fails; this undefined law as to the case before us, ceases to be any thing more than empty sound.

But I will suppose for the sake of argument, that we now were proceeding with the trial of the cause, and the witnesses with the survey and plat were before us, which would show the trespass, if

one had been committed, to have been committed in the territory of New Orleans; what could the court do but send the cause out of doors? For, take notice, there is no fiction in a local action. Here the *Venire* is laid in Henrico, the evidence would come from a distant territorial government, and would not agree without allegations in the declaration; and here would end the struggle. Indeed, taking the premises which I have laid down, to be true, which cannot well be denied; and the question resolves itself into a self evident proposition.

But there would be a failure of justice, unless we sustain this action, and to avoid this evil, we must enact a law; for, I know of no other way of answering the plaintiff's design; but this I cannot consent to do: neither can I fly in the face of my own decisions, until better taught.

But there is no failure of justice; there is a court of competent power to try the cause, if an actual trespass has been committed; and there ought the suit to have been brought against the real trespasser. I own there may be cases where a man might so manage his matters as to run through another's ground, and lay waste his enclosures, and even pull down his fences, and then flee from justice, like another criminal, and thus get out of the reach of the law; which is not uncommon. There are cases that no law can well provide against, and they may be considered as partial evils, and exceptions to a good general rule.

I am too unwell to follow and pay respect to all the arguments which have been advanced in support of the jurisdiction of this court over the case before us—and therefore must conclude by giving my decided opinion in favour of the Plea to the jurisdiction. The cause must therefore go out of Court.

MARSHALL, C. J. The sole question now to be decided is this—Can this court take cognizance of a trespass committed on lands lying within the United States, and without the District of Virginia, in a case where the trespasser is a resident of, and is found within the district?

I concur with my brother judge in the opinion, that it cannot.

I regret that the inconvenience to which delay might expose at least one of the parties, together with the situation of the court,

prevent me from bestowing on this question that deliberate consideration which the very able discussion it has received from the bar would seem to require—but I have purposely avoided any investigation of the subject previous to the argument, and must now be content with a brief statement of the opinion I have formed, and a sketch of the course of reasoning which has led to it.

The doctrine of actions local and transitory has been traced up to its origin in the common law—and, as has been truly stated on both sides, it appears that originally all actions were local. That is, that according to the principles of the common law, every fact must be tried by a jury of the vicinage. The plain consequence of this principle is, that those courts only could take jurisdiction of a case, who were capable of directing such a jury as must try the material facts on which their judgment would depend. The jurisdiction of the courts therefore necessarily become local with respect to every species of action.

But the Superior Courts of England having power to direct a jury to every part of the kingdom, their jurisdiction could be restrained by this principle only to cases arising on transactions which occurred within the realm. Being able to direct a jury either to Surry or Middlesex, the necessity of averring in the declaration, that the cause of action arose in either county, could not be produced in order to give the court jurisdiction, but to furnish a venire. For the purpose of jurisdiction, it would unquestionably be sufficient, to aver that the transaction took place within the realm.

This however being not a statutory regulation, but a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things, was thought susceptible of modification—and judges have modified it. They have not changed the old principle as to form. It is still necessary to give a venue; and where the contract exhibits on its face, evidence of the place where it was made, the party is at liberty to aver that such place lies in any county in England.

This is known to be a fiction. Like an ejectment, it is the creature of the court, and is moulded to the purposes of justice, ac-

according to the view which its inventors have taken of its capacity to effect those purposes. It is however, of undeniable extent. It has not absolutely prostrated all distinctions of place, but has certain limits prescribed to it, founded in reasoning satisfactory to those who have gradually fixed these limits. It may well be doubted, whether at this day, they are to be changed by a judge not perfectly satisfied with their extent.

This fiction is so far protected by its inventors, that the averment is not traversable for the purpose of defeating an action it was invented to sustain; but it is traversable whenever such traverse may be essential to the merits of the cause. It is always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction.

In the case at bar, it is traversed for that purpose, and the question is, whether this be a case in which such traverse is sustainable; or, in other words, whether courts have so far extended their fiction as, by its aid, to take cognizance of trespasses on lands not lying within those limits which bound their process.

They have, without legislative aid, applied this fiction to all personal torts, and to all contracts wherever executed. To this general rule, contracts respecting lands, form no exception. It is admitted, that on a contract respecting lands, an action is sustainable wherever the defendant may be found: yet, in such a case, every difficulty may occur which presents itself in an action of trespass. An investigation of title may become necessary. A question of boundary may arise, and a survey may be essential to the full merits of the cause: yet, these difficulties have not prevailed against the jurisdiction of the court. They have been countervailed, and more than countervailed by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy in a case where the person who has done the wrong, and who ought to make the compensation, is within the power of the court.

That this consideration should lose its influence, where the action pursues a thing not within the reach of the court, is of inevitable necessity; but for the loss of its influence where the remedy is against the person and can be afforded by the court, I have not

yet discerned a reason, other than a technical one, which can satisfy my judgment.

If, however, this technical distinction be firmly established, if all other judges respect it, I cannot venture to disregard it.

The distinction taken is, that actions are deemed transitory, where transactions on which they are founded, might have taken place any where; but are local where their cause is in its nature necessarily local.

If this distinction be established; if judges have determined to carry their innovation on the old rule, no further; if, for a long course of time, under circumstances which have not changed, they have determined this to be the limit of their fiction, it would require a hardihood which I do not possess, to pass this limit.

This distinction has been repeatedly taken in the books, and recognized by the best elementary writers, especially Judge Blackstone, from whose authority no man will lightly dissent. He expressly classes an action for a trespass on lands with those actions which demand their possession, and which are local, and makes only those actions transitory, which are brought on occurrences that might happen in any place. From the cases which support this distinction, no exception, I believe, is to be found among those that have been decided in court, on solemn argument.

One of the greatest judges who ever sat on any bench, and who has done more than any other, to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction, between taking jurisdiction in cases of contract respecting lands, and of torts committed on the same lands, that he attempted to abolish it. In the case of *Mortyn vs. Fabrigas*, Lord Mansfield stated the true distinction between proceedings which are *in rem*, in which the effect of a judgment cannot be had, unless the thing lie within the reach of the court, and proceedings against the person where damages only are demanded. But this opinion was given in an action for a personal wrong which is admitted to be transitory. It has not, therefore, the authority to which it would be entitled, had this distinction been laid down in an action deemed local. It may be termed

an *obiter dictum*. He recites in that opinion, two cases decided by himself, in which an action was sustained for trespass on lands lying in the foreign dominions of his Britannic majesty; but both those decisions were at *Nisi Prius*. And though the overbearing influence of Lord Mansfield might have sustained them on a motion for a new trial, that motion never was made, and the principle did not obtain the sanction of the court. In a subsequent case, reported in 4 D. and E. these decisions are expressly referred to and overruled, and the old distinction is affirmed.

It has been said, that the decisions of British courts, made since the revolution, are not authority in this country. I admit it—but they are entitled to that respect which is due to the opinions of wise men, who have maturely studied the subject they decide.—Had the regular course of decisions previous to the revolution, been against the distinction now asserted, and had the old rule been overthrown by adjudications made subsequent to that event, this Court might have felt itself bound to disregard them; but where the ancient date has been long preserved, and a modern attempt to overrule it, has itself been overruled since the revolution, I can consider the last adjudication in no other light than as the true declaration of the ancient rule.

According to the Common Law of England then, the distinction taken by the defendant's counsel, between actions local and transitory, is the true distinction, and an action of *quare clausum fregit*, is a local action.

This common law has been adopted by the legislature of Virginia. Had it not been adopted, I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connection with the parent state, we did not break our connexion with each other. It remained subsequent to the ancient rules, until those rules should be changed by the competent authority.

But it has been said, that this rule of the Common Law is impliedly changed by the Act of Assembly, which directs that a jury shall be summoned from the bystanders.

Were I to discuss the effect of this act in the courts of the state, the enquiry, whether the fiction already noticed was not equivalent to it in giving jurisdiction, would present itself. There are also other regulations, as, that the jurors should be citizens, which would deserve to be taken into view. But I pass over these considerations, because I am decidedly of opinion, that the jurisdiction of the Courts of the United States depends, exclusively, on the Constitution and Laws of the United States.

In considering the jurisdiction of the Circuit Courts, as defined in the judicial act, and in the Constitution which that act carries into execution, it is worthy of observation, that the jurisdiction of the court depends on the character of the parties, and that only the court of that district in which the defendant resides, or is found, can take jurisdiction of the cause. In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight. But according to the course of the Common Law, the process of the court must be executed in order to give it the right to try the cause, and consequently the same defect of justice might occur. Other judges have felt the weight of this argument, and have struggled ineffectually against the distinction, which produces the inconvenience of a clear right without a remedy.—I must submit to it.

The law upon the demurrer is in favour of the defendant.

DISTRICT COURT OF THE UNITED STATES.

GEORGIA.

Woodruff and Brant, Fountain, Hewitt and Others,
versus
Ship Levi Dearborn.

IN ADMIRALTY, 17th JULY, 1811.

[Where cordage and other materials are furnished, at the instance of the owner, to a vessel not on a voyage, but lying within the body of a county, no lien on the vessel is created, so as to affect her in the hands of a *bona fide* purchaser, without notice. *Ex relatione*—Stephens, Judge.]

Charlton, for the Claimant, argued,

1st.—Whether the Admiralty Court has jurisdiction?

2d.—Whether, if a jurisdiction can be sustained, there can be a lien on this ship, under the particular facts and circumstances of the case?

First Point. As to the question of jurisdiction:—

The Admiralty proceeds in *rem*, and therefore, if these are not charges upon the ship in specie, the court has no jurisdiction.

The most important matter under this head which presents itself for the consideration of the Court, is, whether it is to proceed according to the principles and doctrines of the CIVIL LAW, as it obtains in those nations, which have made it the foundation of their jurisprudence, or according to the MARITIME LAW, as it has been adopted and explained by the Courts of Great Britain. If, according to the CIVIL LAW, it is admitted that the ship is specifically liable.—Abbot, (Story's Edition) and the authorities there cited. 151, 152, 153.

It is contended that the same doctrine has been adopted by the English Courts, in the case of *Rich vs. Cox*, by Lord Mansfield, Cowp. 636. It is there laid down, that the person supplying necessaries, has three remedies. 1st. Against the owner. 2d. Against the Master. 3d. Against the ship.

But this case appears, not only to have been subverted by other decisions, but by a subsequent decision of Lord Mansfield, himself. *Wilkins vs. Carmichael*, 3 Dougl. 101. cited in Abbott, (Story's Edit.) 158.

In this case, Lord Mansfield, after stating the reason, why the master should not be permitted to retain the ship, adds, that if "there was any lien originally, it was in the carpenter, and he, by giving up the possession, had parted with the lien, *if he ever had one*." Here is a strong doubt suggested, whether even the carpenter, whose labour enables the ship to prosecute her voyage, can resort, specifically, to the ship: and it is impossible to reconcile this case with the opinion expressed in *Rich vs. Cox*, because in the conclusion of this case, his lordship observes: "Work done for a ship in England, is supposed to be on the personal credit of the employer." The supplies in *Rich vs. Cox*, were furnished in England; the treble security was therefore as inapplicable in the one case as the other.

Mr. Abbot considers this latter case subversive of the former. Abbott, 153.

In *Westerdell vs. Dall* 7. T. R. K. B. 312. Lord Kenyon questions the authority of *Rich vs. Cox*, as establishing the principle upon two broad a basis; Abbott 153. A shipwright who has taken a ship in possession to repair it, may retain that possession until he is paid, but if he parts with the possession, he abandons also his lien upon the ship itself. So it is with a tradesman furnishing supplies.—*Ibid*.

The master may hypothecate for supplies and repairs abroad; but if the ship is within port, *infra corpus comitatus*, they are not a lien or charge on the ship. *Hore vs. Clement*. 2. Show. 388.—Abbott 154.

In *Watkinson vs. Bernadeston*, the law is clearly laid down; "that if a ship be in the River Thames, and money is expended

there, either in the repairing, fitting out, new rigging, or apparel of the ship, *this is no charge upon the ship*, but the person thus employed, or who finds these necessities, must resort to the owner thereof for payment, and in such a case, in a suit in the Court of Admiralty to condemn a ship for the non-payment of the money, the Courts of Law will grant a prohibition." 2. Pr. Wms. case 167.

The law contained in this decree was considered to be so well established, that the reporter observes: "it was decreed by the Master of the Rolls, and seemed to be admitted by the Counsel on both sides."

See also *Buxton vs. Shee*, 2 Vez. 521 in notes. The Scotch case *Abbott* 159, and *ex parte*, *Shanks* 1. Atk. 234.

The doctrine of these cases does not appear to have been shaken by any of the latter decisions in the Admiralty of England.

The case of "the John" 3 Rob. Ad. R. 288, was an application by material men against the *proceeds* remaining in the registry. In this case Sir Wm. Scott observes, "I find, that it has continued to be the practice of this court to allow material men to sue against remaining proceeds in the registry, notwithstanding that prohibitions have been obtained on *original suits* instituted by them."

This is a proceeding of material men, by *original suit*, against the Levi Dearborn, and if instituted in the Admiralty of England would be a ground for prohibition, according to the admission of Sir Wm. Scott and the authority of all the cases, with the exception of *Rich vs. Cox*.

In the *Favourite*, 2 Rob. Ad. Rep. 195, (Amer. Ed.) it was said by Dr. Swabey, that *material men*, by the indulgence of the court, may be allowed to be paid out of *proceeds* in the hands of the court, although they would not be allowed to proceed originally against the *ship*." Sir Wm. Scott admits this to be true, where there remained an "undisputed surplus, after payment of the debt, which was the original cause of action," and no person objecting.

(For the meaning of material men, see the note (a) in the same page.)

There has been no decision on the subject, by the Supreme Court of the United States. There are two however, one in the District Court of Maryland, and the other in the District Court of Pennsylvania, which are relied upon by the opposite counsel, as supporting the claim to jurisdiction.

In the former it was decided by Judge Winchester that a shipwright has a lien on the ship for repairs in a port of the United States. *Stephens vs. Ship Sandwich*, 1. Pet. Ad. 233 note—and it is contended, that a similar opinion is expressed in the latter, by Justice Peters. *Gardner vs. Ship, New Jersey*. Pet. Ad. Rep.

Any thing that emanates from so great a man as was Judge Winchester, must carry with it a great weight of respect and authority, but the principles of this decision are founded upon the doctrines of the civil law, which cannot be received in our country; and it must also be remarked, that Zouch upon whose authority the learned Judge principally relies, does not state correctly the practice of the English courts, which he brings in to the aid of the Civil Law opinions. Be this however as it may, we have only the insulated opinion of Judge Winchester, in opposition to the whole current of English adjudications, and what the whole profession have been in the habit of considering the settled and established law and practice of this country.

An opinion directly opposite to that of Judge Winchester, is expressed in the case of *Shrewsbury vs. sloop Two Friends*, Admiralty Court of South Carolina, Bee's Rep. 433, in which all the leading British decisions are cited, and commented on by the learned Judge with considerable ability.

It results I think from a view of all the cases, and the reasoning in support of them, that this court has no jurisdiction.

Second Point. But if the court should be of a different opinion, then we contend, that the peculiar circumstances and facts of this case, will exempt the ship from any liability.

The lien attempted to be imposed must be predicated upon the idea of there being an owner and a master; for the treble security is against the owner, the master, and the ship. Now we say, that at the time these repairs were made, and supplies furnished, there

was not legally and technically speaking either owner or master. This will appear from a short history of the case, as it was presented to the court on a former occasion.

This ship was formerly called the *Little Sally*, owned by British subjects, and condemned in the Admiralty, for an infraction of the non-intercourse law. At the sale, pursuant to the decree of condemnation, she was knocked off to a Mr. C. H. Fisher, who previous to the obtainment of a title from the Marshal transferred his right to the purchase, to a Mr. A. W. Scribner, who was put in possession of the ship, and appointed Lightbourne as master, in contemplation of an intended voyage. During the period of this possession by Scribner, the repairs and supplies, the subject of the present litigation, were made and furnished, upon the contract of Scribner, or the master Lightbourne. Only a small part of the sum which Scribner had agreed to pay Fisher for his purchase, was actually paid, and he had no other title than the memorandum of an agreement between him and Fisher, and the possession which he had obtained. The balance being demanded by the Custom-House, and no further payment having been made by Scribner, the Marshal again took possession, and advertized a second sale. In the meantime, the present claimant, Mr. John H. Dearborn, agreed to pay into the Custom-House, the amount of the sum for which Scribner had purchased the ship of Fisher. This proposal was acceded to by the Marshal and the Custom-House,—a bill of sale was given by the Marshal to Mr. Dearborn, and a register by the Collector, under the new-name of "*The Levi Dearborn*." The register is dated on the 16th of June.

From the day of sale then to the obtainment of the register, the ship was in *custodia legis*, it was vested in the United States, not as owners technically considered, but for the purposes of sale.

The United States cannot be owners, nor, can the marshal, or officers of the Customs be considered as owners, the latter by the express inhibition of the act of Congress. Nor, to use the language of the civil law, could there be even a *quasi* ownership in the officers of the customs, because it would result from that doctrine, that the officers of the Customs could give a bill of sale,

Such a power would be inseparable from the character of ownership.

It is absurd to contend, that there could be an ownership without the power to transfer. Now the Marshal only could give a bill of sale.

If neither the government, or any officer representing it, can be considered as owners, or owner, there could be no master, and consequently no person whose contract could impose a specific liability on the ship for repairs and supplies.

It must be admitted that all repairs are made, or supplies and necessities furnished at the request of the owners, or master, and that the master derives his authority from the owners. Hence the law imposes a liability upon both.

For what purpose is the master appointed? Why, to command a ship in the prosecution of a voyage. His functions have an extensive relation to the operations of a ship in the course of a voyage: all his contracts must bear upon that point.

Now, if there were no owners, no master could be properly appointed where contracts can fix a lien upon this ship, because these contracts cannot be considered as furnishing the means for the employment of the ship in a voyage; and if the ship was in the hands of the officer of the government, they could not be considered as furnishing the means for the active employment of the ship, because the ship could not be employed by the government, or its officer. The liability of the ship (if she is liable at all) arises from the contract of the owner or the master. The corollary is, that there being in this case neither owner or master at the time of the repairs and supplies, there is no foundation for this admiralty proceeding.

On the day of June a bill of sale was given to J. H. Dearborn the claimant, and his complete title is established by the exhibition of the register.

He has paid all the expenses, which the collector admits to be due by the ship, antecedent to this transfer. The question then is, is this property, thus guaranteed to him under the faith of the United States, to be taken fettered with the burthens and contracts, imposed upon it by persons claiming an ownership, in direct op-

position to a judgment of this court ; or by the person acting as master by virtue of an appointment derived from the pretended owner ? Did the Government, the Marshal, or the Collector, previous to the sale to the claimant, recognize Mr. Schribner, as the owner, or Lightbourne as his master ? Mr. the officer, representing the government, contended, and this court decided on a former occasion, that the claim of Scribner was totally unfounded, and that the ship antecedent to the sale to Mr. Dearborn, was never out of the legal custody and possession of the Marshal. Upon what ground of law, reason, or justice, then, can this ship in the possession of the present owner be made liable for antecedent repairs ? By parity of reasoning, she could be charged specifically, for repairs and supplies in England, or any other contract previous to her condemnation, which operates as a lien.

It results, that the remedy which these libellants have is confined to the persons who contracted with them, and that the ship is discharged.

STEPHENS, J. This ship is libelled for sundry articles, work done and for a claim of wages due several seamen ; to avoid a multiplicity of suits several claims are consolidated so as to bring the demands of all or either before the court, against the jurisdiction of which a plea is interposed in the claims of J. H. Dearborn. It was necessary to have a full knowledge of this case, not only to hear argument as to the jurisdiction, but to have authenticated and proven the demands of such of the libellants as were principally before the court, and from which investigation the following facts appears. The ship *Levi Dearborn* was formerly called the *Little Sally*, a ship owned by British subjects, libelled by the United States for violating the non-intercourse law, and condemned as forfeited to the United States, in form, and decreed by this court to be sold : which was carried into effect. It appeared that Mr. A. W. Scribner was the first purchaser of this vessel, and had permission from the collector to proceed to lade her, but it also appeared that Scribner failed to comply with his contract, whereby the Marshal re-advertised the ship, upon which some compromise took place between the parties interested, and John H.

Dearborn became the purchaser, received the Marshal's title and on the 19th of June last received a register for the said ship from the Custom-house in Savannah. From the time Mr. Scribner undertook to be the owner of this ship he employs Capt. W. Lightbourn as master, and proceeds to prepare the vessel for sea, under the name of the Franklin. An account is opened with Woodruff and Brant for ships articles as appears by the exhibit, as also supplies of cordage by Fountain, and work and labour by Hewit a shipwright. All these accounts were opened by express direction of Scribner, and they are admitted to be just by Lightbourn the captain. It is also in evidence that at the time John H. Dearborn purchased this vessel he was apprised of some demands against her by the collector, which were satisfied, and hence became a fair bona fide purchaser. So far as the above relates to the libellants mentioned, appears to be the summary of their case. The demands of seamen will form another subject of enquiry to see if they can proceed for their dues in this way.

The variety of authorities adduced to support the libel, and those opposed to it, it should seem have compressed all the reading on the subject, and which has been illustrated with great ability by the gentlemen on both sides; indeed, so much so as to leave very little research for the Judge on a question of real importance taken in every point of view.

It is to be understood that this court is of special jurisdiction and its exercise can only extend to maritime cases.

All the transactions between these libellants were with Scribner, the actual and reputed owner living in Savannah, the ship was on no voyage that caused the injury to repair her, or for the supplies to aid her, so as to create any lien on the vessel whatever: the whole was a contract within the body of the county, a part of a sovereign state, whose constitution and laws afford daily an opportunity to seek redress in the very many tribunals of justice in this city.

Now as I cannot see this case to be of admiralty or maritime jurisdiction so as to work a lien on a ship lying in the river, because labour was bestowed and supplies furnished the person who exercised an ownership, and at his instance, I cannot sustain the

libel and subject, a vessel in the possession of a bona fide purchaser for valuable consideration, to claims which he never could have supposed to have attached to the ship.

The various opinions that have been afloat on the points before me, seem now to be very well understood and the reading and result well digested in the case before Judge Bee, of Shrewsbury and the sloop Two Friends, in Charleston, a case very similar to the present, and therefore the redress to the libellants must be at common law. The libel is dismissed, each party paying his own costs.

As to the seamen, I find there is no ship articles or agreement signed by them, but they were daily labourers. They must be referred also to those who employed them, as divers others, who exhibited demands for various supplies to this ship.

Savannah, 17 July, 1811.

W. STEPHENS,
Dis. Judge, Georgia.

Mr. Noel, for Libellants.

Mr. Charlton, for Claimants.

CIRCUIT COURT OF THE U. S. GEORGIA.

DECEMBER TERM, 1811.

Woodruff & Brant, and Others, *versus* The Ship Levi Dearborne.

APPEAL FROM THE DISTRICT COURT.

The libel charges, that the ship is answerable specifically for materials furnished and work done, in refitting her, between the ninth of May and the seventh of June, 1811. That the ship Levi Dearborne, formerly the Little Sally, a British bottom, was forfeited to the United States, and a sale decreed to be made, on the eighteenth of April, 1811—that she remained unsold—that the materials and work were furnished by request of the master.

The claim states that the ship was forfeited, for a violation of the non-intercourse laws, and sold on the 18th of April, 1811.—That the terms of sale not being complied with, she was resold on the 18th of June last; when the claimant (Dearborne) became the purchaser, and received from the Marshal, a bill of sale, dated April 18th. That he purchased on the faith of the government and its officers, without being notified of the supplies and repairs alleged in the libel. That Captain L. did not take charge of the ship, by authority from the claimant, nor was he authorised by the claimant to direct the supplies and repairs, but received his authority from Scribner, who was in possession.

No. XIII.

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Mr. Noel for the libellant. It is alleged in the libel and proved by the testimony, that when the materials and repairs were furnished, there was no responsibility to the libellants, except that of the ship. There was no actual ownership or existing operative title. The right acquired by the government, by seizure and condemnation, before sale, was imperfect. Scribner was in possession for a short time, but without title—he had not paid the purchase money. The actors in this suit did not know, or treat with Scribner, as the owner—they furnished the materials and work on the sole credit of the ship. The claim admits that Scribner was not the owner, and it is not proved that Scribner had assumed payment. Captain Lightbourne did not call for the repairs and materials, on the credit of any other person, but as master of the ship.

2d. The appellants have a specific remedy against the ship, admitting the statement of facts made by the respondent. The District Court has jurisdiction, as an Instance Court of Admiralty, to make the ship liable for repairs and materials. This jurisdiction is derived from the Civil Law. In maritime cases, the Courts of the United States are governed (except in questions of prize) by principles of the Civil Law, or by positive Statutes. Every man who has repaired or fitted out a ship, or lent money to be employed in those services, has by the civil law, a lien on the ship. Abbot, p. 151. Domat. B. 3d. It may be said that the maritime law is a part of the common law of Great Britain, and that the Common Law is the law of the United States, where not superseded by positive statutes. The correctness of these positions shall be considered, after having taken notice of the British adjudications, upon this subject.

There is no rule of the Common Law, which makes property subject to specific liability, or creates a lien by implication, as a security for the performance of a contract or payment of debt. This is a remedy peculiar to the Civil Law. The exercise of it by the Courts of Admiralty, early became a source of jealousy, and produced the statutes 13th and 15th Richard II. Yet, we find, that even the Courts of Common Law disregarded the restrictions intended by those statutes, for several centuries after they were enacted. It has uniformly since been held, that suit may be main-

tained in the Admiralty for seamen's wages, though the agreement was made on land. Roll's abridgement, 533; 2 Bacon 181.— In Hilary term, 8 Charles II. it was resolved by all the judges, that if suit be in the Admiralty for building, amending, saving or necessary victualling of a ship, against the ship herself, no prohibition shall be granted, though this be done within the realm.— Croke Charles, p. 296. The first case opposed to that decision is, *Watkinson vs. Bernadiston*, 2 Peere Williams, p. 367, afterwards *Buxton vs. Snee*, 1 Vesey, p. 154. Notwithstanding these cases, we find Lord Mansfield declaring, in unqualified terms, that whoever supplies a ship with necessaries, has a treble security:— 1st, The master. 2d, The ship. 3d, The owner. His lordship adds, “suppose the owner in this case, had delivered the value of the goods in specie, to the master, with order to pay it over to the creditors, and the master had embezzled the money, it would have been no concern of the creditors, for they trust specifically to the ship, and generally to the owners.” Cowper, p. 639. *Rich vs. Coe*. Mr. Abbot has mentioned the decision by Lord Mansfield, in *Wilkins vs. Carmichael*, Douglass, p. 101, as somewhat repugnant to the former. His lordship there is made to say, that “work done for a ship in England, is supposed to be on the personal credit of the employer,” the amount of which is, that work done, where the owner is present, shall be considered *frima facie*, as done on his credit. From this review of the adjudged cases in England, it must be inferred, that the doctrine by which a lien upon the ship has been *restrained to a foreign ownership*, is not so clearly settled, as stated by Abbott. Judge Winchester has remarked, 1st Peters, p. 255, that “the reports of decisions in that country, are perfectly irreconcilable. That no principles can be extracted from the adjudged cases in England, which will explain or support the admiralty jurisdiction, independent of the statutes, or the works of jurists who have written on the general subject.”

But, however well settled the doctrine may be in the British Courts, it cannot operate here, in repugnance to a principle of maritime law. From what source do we derive those principles — They do not take effect here, as a part of the Common Law of England. The state governments adopted the Common Law, as to all

cases to which it is adapted. But this is not the medium through which the maritime code has obtained operation in the United States. The Courts of the United States are tribunals of special jurisdiction. Their powers are derived, exclusively, from the Constitution and Laws of the United States: Constitution, 3d art. 2d sec. "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the Laws of the United States, and Treaties." Various classes of cases are specified.—Among these are "all cases of *admiralty and maritime jurisdiction*, and controversies between citizens of different states, and between citizens and foreigners."

As to real and personal remedies, no principles of decision are designated by the Constitution—they were left to be prescribed by the Legislature. The Legislature has not prescribed. The *lex loci* has therefore necessarily been resorted to by the courts, and in most cases which have arisen, the Common Law has prevailed, not as the law of the nation, but as the law of the place—not of the state where the court sits, but as the law of the place where the cause of action may have arisen, in whatever clime, or under whatever government.

Respecting maritime cases, principles of decision were recognized and adopted by the letter of the Constitution. The terms there used are "*cases of admiralty and maritime jurisdiction*."—These terms relate to a jurisdiction, peculiar in its operation, and in the principles by which it adjudicates. They essentially appropriate to that jurisdiction, those peculiar principles which characterise "*admiralty and maritime cases*," and by which alone they must be decided. Hence, if Congress should by law enact, that a cause of action arising on the high seas, shall be cognizable by courts proceeding according to the course of the Common Law, would not such provision, by destroying the principle of decision, break down a jurisdiction created by the Constitution? We infer, that the maritime code is the law by which the right of the libellants is to be decided. That this system operates, not as it does in England, as a set of customs, forming a part of the *lex non scripta*, but as a separate and distinct code.

Mr. *Harris*, for the claimant, commenced his argument, and was stopped by the Court.

Judge *Johnston*. It must be conceded, that the question made in this cause, is one hitherto unsettled in the Courts of the United States. The argument in support of this libel, has proceeded on the ground, that the Admiralty Law of the United States, is the Civil Law of the Roman Government; but the civil law has undergone many changes and modifications, which we are not bound to trace. The Admiralty Law of Great Britain is the Admiralty Law here. The lien on vessels for material-men and ship-wrights, exists only in a foreign port. Where the owner is present and resident, the Common Law principle must govern. In such case, no lien on the vessel is created. In the case of an owner, who, though present, when the work and materials are furnished, is transient and non-resident, I am disposed to think otherwise, and that in such case, the lien attaches. It is proper also to state, what shall be deemed a foreign, and what a domestic port, as to this question: the seaports of the different states ought, in this respect, to be considered as foreign ports, in relation to each other. Charleston, for instance, is a foreign port, as to a claim of this nature, made in Savannah. In the present case, the ship must be considered as having become a domestic ship from the time of the marshal's sale.—The decree of the District Court is therefore affirmed.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA.

MAY 1811.

Munns, *versus* Du Pont De Nemours & Co.

In the Circuit Court of the United States, sitting at Philadelphia, before Judges Washington and Peters, and a Special Jury... Monday, 6th May.

This was a cause of great interest and expectation. It was an action for a malicious prosecution, wherein the plaintiff laid his damages at one hundred thousand dollars: 1st. for having charged the plaintiff before Mr. Alderman Keppeler, in Philadelphia, with having stolen a brass pounder and three drafts of machinery, and with thereupon having the plaintiff imprisoned. 2d. for bringing a civil action against the plaintiff, and demanding excessive bail. 3d. with having caused the plaintiff to be indicted in Delaware as the receiver of five pieces of parchment sieves, knowing them to have been stolen—all charged to have been done maliciously, and without probable cause.

The case was conducted for the plaintiff by Messrs. Brown, Hopkinson, and Rawle—and by Messrs. Charles J. Ingersoll, Binney and Ingersoll, for the defendants.

The evidence was voluminous, and as it is very clearly set forth in Judge Washington's charge to the Jury, we forbear attempting an outline of it.

Judge Washington's Charge:

Gentlemen of the Jury,

The plaintiff having some skill in the mystery of making gunpowder, engaged with Brown, Page and Company, of Virginia, in November 1808, to superintend the manufactory of that article

which they were about to establish near to Richmond; and with a view to obtain more complete information of the art than he then possessed, or to procure workmen, or certain parts of machinery, he came to the northward early in December. On the 9th, he put up at the Inn called the Buck, within half a mile or thereabouts, of the powder manufactory of the defendants, on the Brandywine, about four or five miles from Wilmington, in Delaware. The powder of this factory had obtained great celebrity, and commanded the market, in consequence of the skill employed in making it, and probably from the use of certain parts of the machinery employed, particularly certain parchment sieves.—The plaintiff, immediately after his arrival at the Buck, opened a correspondence with some of the defendant's workmen, and had frequent interviews with them at the tavern, at which he made them considerable offers to induce them to leave the service of the defendants, and go to the manufactory at Richmond....He also made them pecuniary offers to procure for him patterns or models of the different parts of the machinery used by the defendants, and particularly to procure for him one of the brass pounders, or a pattern of it.

The defendants, hearing of the plaintiff's conduct called upon him at the tavern and after offering considerable violence to his person ordered him to quit the neighbourhood, which he did on the 14th. It is proper to remark that great pains were taken by the defendants to preserve the secrets of their arts, and that strangers were not, without leave, admitted into their factory. Shortly after the plaintiff had left this neighborhood, two of the defendants workmen secretly went off, and at the same time one of the brass pounders was missing. The plaintiff came to Philadelphia a few days afterwards: the defendants also came to this city. On the 22d of December, they applied to alderman Kepple for the warrant stated in the first count of the declaration and on their oath valued the property charged to have been stolen at 10,000 dollars. The officer to whom the warrant was delivered, met with the plaintiff the next day, and enquired of him if his name was not Munns. The plaintiff denied it, and assumed a fictitious name. The officer however being satisfied that he answered the description, carried him to the house of the high constable, where he ac-

knowledgeed himself, and after he was informed of the nature of the charge against him, he put to the officer this question, "if I was in the company of him who had stolen certain articles, am I guilty?" The officer declined giving any answer, and conducted the prisoner to the office of Mr. Kepple. There he was examined and by order of the Alderman his person was searched, when certain letters were found in his pocket book, from him to Brown, Page, & Co. and from them to him, by which it appeared that the plaintiff, previous to his arrest, knew that the defendants were in Philadelphia, and suspected they were following his steps—that he had obtained all the information he wanted to enable the Richmond, to equal the Brandywine powder manufactory—and that some of the hands belonging to the defendants had left them and gone to Richmond.

The Alderman committed the plaintiff to the jail of Philadelphia, having required bail to the amount of 15,000 dollars which the plaintiff could not give. On the 27th, the plaintiff was carried before Judge Rush, on a habeas corpus, who reduced the bail to 1,000 dollars; but this he could not get, and was again committed. On the 20th, the defendants sued out the writ mentioned in the second count, for seducing the defendant's workmen and servants, demanding bail in 6,000 dollars, which on citation before Judge Rush, was reduced to 600 dollars.

The defendants having obtained from the governor of Delaware a requisition on the governor of Pennsylvania, for the plaintiff's removal to the former state as a fugitive from justice, he was accordingly removed on the 6th Jan. 1809, to the jail of New-Castle. On the plaintiff's removal to Delaware, the defendants discontinued their civil suit in Pennsylvania, and renewed it in Delaware, laying their damages at 2000 dollars. On the 4th February, the plaintiff, on a habeas corpus, obtained from the Chief Justice of Delaware, was discharged from confinement on the criminal charge, upon the ground that he ought to have been committed under a warrant from some magistrate of that state, and not under the warrant of the governor of Pennsylvania, which authorized only his removal from the one state to the other: but he was remanded by the Chief Justice of Delaware, to answer in the bail

of 2,000 dollars to the civil action.—Thinking now to correct this error the defendants obtained a second warrant against the plaintiff from a justice of the Peace of Delaware, charging him with a suspicion of having stolen a brass stamper and sundry other articles, of the value of 40 dollars, or of having caused them to be stolen. It is admitted that the stamper is the same instrument with the pounder mentioned in the warrant issued by Mr. Keppele. On the 11th March, the plaintiff was discharged upon a habeas corpus, on the ground that by the law of Delaware no person can be committed by a judge or justice, who has once been discharged upon a habeas corpus from confinement on account of the same offence. In May a bill was sent to the Grand Jury charging the plaintiff as the receiver of four pieces of parchment seive, the property of the defendants, knowing them to have been stolen. The jury found the bill, the trial was postponed, on the plaintiff's application, till the following December, the plaintiff remaining in jail till October, and finally on his trial he was found not guilty by the petit jury. The Attorney General then moved the court to certify probable cause, in order to compel Munns to pay the costs of the prosecution, agreeably to the constitution of Delaware; but the counsel of Munns agreed, that his client should pay the costs, if the court would not grant the certificate, in consequence of which, the certificate was not granted.

The remainder of the evidence, except such parts of it, as will be more particularly noticed hereafter, relates to the plaintiff's sufferings, which it must be acknowledged were very great. But as to these it is to be observed that except where they were produced by the immediate agency or interference of the defendants, no inference or malice can be drawn from these sufferings to charge the defendants, although they may be considered in estimating the damages, if the plaintiff has made out such a case as to entitle him to a verdict for any thing. For the assault and battery at the Buck tavern, the defendants have been indicted and punished by a fine of fifteen dollars each, and therefore that transaction is no otherwise to have influence on your minds than as it may become an item in the account of malice, charged upon the defendants. So too the high value affixed to the articles charged

to have been stolen, in the Philadelphia warrant, and the low value affixed to the same articles in the Delaware warrant, and the amount the damages claimed in the civil suit brought in Pennsylvania, are only to be considered in relation to the question of malice.

The question then is, are the defendants liable for damages on account of the warrant issued by Mr. Keppele, and the consequent confinement of the plaintiff—and secondly, are they liable in consequence of the indictment in Delaware and the injuries to which it exposed the plaintiff.

The question upon which the case must be decided, is not, whether the plaintiff has suffered from a charge of which the defendants were the authors, and which in point of fact was not founded in truth, but whether the charge was made maliciously and without probable cause. In trials of actions of this nature it is of infinite importance to mark with precision the line to which the law will justify defendants in going, and will punish them if they transcend. On the one hand public justice and public security require that offenders against the laws should be brought to trial, and to punishment, if their guilt be established. Courts and jurors and the law officers, whose duty it is to conduct prosecutions against public offenders, must in most instances, if not in all, proceed upon the information of individuals, and if these actions for malicious prosecution are too much encouraged—if the informer acts upon his own responsibility, and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found bold enough, at so great a risk, to endeavor to promote the public good. The informer can seldom have a full view of the whole ground; and must expect to be frequently disappointed by evidence which the accused alone can furnish. Even when possessed of the whole evidence, he may err in judgment, and in many instances a jury may acquit, where to his mind the proofs of guilt were complete. It is not always the fate of those to command success, who deserve it. On the other hand the rights of individuals are not to be lightly sported with, and he who invades them ought to take care that he acts from pure motives, and with reasonable caution: for the integrity of his own conduct he must be responsible, and his sin-

cerity must be judged of by others from the circumstances under which he acted—If, without probable cause, he has inculpated another and subjected him to injury in his person, character or estate, it is fair to suspect the purity of his motives, and the jury are warranted in presuming malice—But the malice should be proved—Yet if the accusation appear to have been founded upon probable ground of suspicion, the accused is excused by the law. Both must be established against him—malice and the want of probable cause. Of the former the jury are exclusively the judges. —The latter is a mixt question of fact and law—what circumstances are sufficient to prove a probable cause must be judged of and decided by the court. But to the jury it must be referred to say whether the circumstances which amount to probable cause, are proved by credible testimony.

What then is the meaning of the terms “probable cause?” I answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant the belief, that the person accused is guilty of the offence with which he is charged. What then were the grounds of suspicion upon which the defendants acted in relation to the warrant of Alderman Keppel, under which the plaintiff was apprehended and committed? The plaintiff was a stranger, and his character totally unknown to the defendants. He took up his abode at an obscure tavern in the neighbourhood of the defendants’ manufactory, where he contrived to procure frequent interviews with the workmen employed there, for the purpose of seducing them from their engagements with the defendants, and of obtaining from them a knowledge of the machinery, and process used in the manufactory of gun-powder, which the defendants had carefully endeavoured to keep secret. He offers one of them in particular, Boughman, a reward, for bringing to him a brass pounder, or a pattern of it. The pounder was brought, was afterwards concealed, and about the same time, Boughman secretly absconded. The plaintiff came to Philadelphia, and, although soon afterwards he knew, that the defendants were also in this city, and suspected that they were following his footsteps, as he expresses it in a letter to his employers, yet when arrested by the constable, he denied his name, and put to that offi-

cer a question by no means calculated to allay the suspicions excited against him. The letters taken from him by the Alderman, disclosed fully the objects which had carried him to the neighborhood of the defendants, and contained certain allusions to the articles of machinery which the defendants had missed.

Called upon to declare an opinion, whether these circumstances afforded a probable cause for the prosecution in relation to the brass pounder, the Court feels no hesitation in saying, that they did: and still further, that the plaintiff has no person but himself to blame for that prosecution, and the sufferings it occasioned. A man may, undesignedly and innocently, become the object of suspicion, and of unmerited, though justifiable prosecution. In such case, he may with great propriety, call upon his accuser to acquit himself, by strong evidence, from the charge of rashness and malevolence, before he can claim to be excused from the consequences of his conduct. But if he has intentionally acted in such a manner as to connect himself in the supposed guilt, and has in fact participated in it, shall he be permitted afterwards to complain, that he had become an object of suspicion, and claim the assistance of the law for the losses to which he had thus exposed himself?—In this case, the brass pounder was taken and carried away, at the instigation of the plaintiff, was in his possession, as he afterwards acknowledged, and was then concealed by the person who took it, and who afterwards absconded—and does it now lie in the plaintiff's mouth to say, that the defendants had not probable cause for suspecting him as the felon?

But it is said, that still there is no proof that a larceny was committed by any person, and that such proof is necessary to the defence. Without determining conclusively upon the soundness of this doctrine, I must be permitted to express the Court's hesitation in approving it. It would seem to demolish the whole ground of defence allowed to a defendant in this action, if, notwithstanding the strongest circumstances of guilt, the motives of the action should, upon a full examination of the evidence to be furnished by the person suspected, turn out differently from what they appeared—if probable cause shall excuse, in relation to the person suspected, and yet afford a protection, as to the offence supposed to

have been committed. But it is by no means to be admitted, that a larceny was not committed in relation to this brass pounder. Baron Eyre, defines larceny to be "the wrongfully taking of goods with intent to spoil the owner, *causa lucri*:" and what are the facts in this case? Boughman secretly took and carried away this instrument, for a reward promised him by Munna, as is proved, and concealed, or otherwise disposed of it, so that it was lost to the owner. Whether his intention was to spoil the owner, or to convert the articles to his own use, would be a proper subject of enquiry with the jury upon all the circumstances of the case.

But it is proved by two witnesses, that the plaintiff afterwards acknowledged that Boughman had *stolen* the pounder, and whether in technical language, he had done so or not, the plaintiff cannot in this action, make it an objection, that in point of strict law, a larceny was not committed.

As to the three drafts of machinery, charged to have been stolen by the plaintiff, it must be admitted that the defendants proceeded, not only without probable cause, but without any cause at all. It does not appear by the evidence that the defendants even possessed such drafts, and consequently they could not be deprived of them. This charge (which is certainly unfounded) being connected in the same warrant with another which was founded, may or may not have produced injury to the plaintiff; and if, in your opinion, it did so, and was moreover maliciously made a ground of prosecution, the plaintiff is entitled to a verdict, on that account, for such damages as you may think proper.

I shall notice the warrant taken out by the defendants in Delaware, merely for the purpose of observing, that it is not made a distinct ground of charge against the defendants, and is relied upon only as a circumstance to prove malice. Of course, no damages could be given on account of that procedure, even if it had been made without probable cause of obtaining the first warrant, the grounds of suspicion had received additional strength, before the second was granted, the plaintiff having previously acknowledged that the pounder had been stolen by Boughman, brought to him, and afterwards concealed,

The second ground of complaint is, the indictment against the plaintiff, in Delaware, for having received five pieces of parchment, four of them perforated with holes, knowing them to have been stolen. How stands the fact in relation to these articles? It is in full proof, that Peebles, one of the defendants' workmen, employed in their factory, by the plaintiff's procurement, cut from the parchment sieves, belong to the defendants, without their knowledge or consent, a number of pieces of different sizes, which Munns afterwards had in his possession, and which were produced on his trial. And if this evidence required any support, the finding of the bill of indictment, and the agreement of the plaintiff's counsel to pay the costs of that prosecution, which the law excused him from doing, unless a certificate of probable cause was granted, are conclusive upon the point of probable cause, in this part of the case.

Upon the whole, the plaintiff is not entitled to a verdict, as to the two charges, which respect the pounder and the sieves, because, though he should have proved malice to your satisfaction, the defendants have justified themselves, by proving probable cause for those prosecutions. As to the three draughts of machinery, you are to decide, whether that charge was maliciously made, and was productive of injury to the plaintiff.

When the jury returned with their verdict, the plaintiff declined to answer, but suffered a nonsuit.

HABEAS CORPUS. PENNSYLVANIA.

AUGUST, 1810.

The Commonwealth, *vs.* Lambert Smith.

TILGHMAN, C. J. **SILVA**, a black girl, of the age of fifteen, who has been brought before me on a Habeas Corpus, is claimed by **E. L.** as her servant, till the age of twenty-eight years. It appears that Silva was formerly the slave of **E. B.** a French woman, who resided in the island of Cuba. **Mrs. B.** was one of those unfortunate persons, whom the Spanish Government, from motives of policy, compelled to leave Cuba. She came to Rhode-Island, in the spring of last year; and in the month of August following, arrived in Philadelphia, bringing Silva with her. On the ninth of last August, **Mrs. B.** executed a deed of manumission of Silva, who, on the same day bound herself, by indenture, as a servant, to **Mrs. B.** her executors and assigns, for thirteen years, from the date of the indenture. **Mrs. B.** covenanted to find her sufficient meat, drink, cloathing, washing and lodging. This indenture was executed in the presence of Alderman Douglass, on the 13th July, 1810. **Mrs. B.** in consideration of two hundred dollars, assigned the indenture to **E. L.** in presence of Alderman Douglass. **Mrs. B.** did not come to the United States with a view of settling here; and since the assignment of the indenture, she has gone to France.

It is contended on the part of Silva, that under the circumstances of this case, the indenture is void; because she was entitled to

freedom, immediately upon her importation into Rhode-Island, and therefore, the deed of manumission, in consideration of which, the indenture was given, was useless ceremony, which only tended to deceive her. Several Acts of Assembly of this State, respecting the abolition of slavery, have been introduced into the argument; but I do not think this case will turn upon them. It has been customary for negroes, in Philadelphia, claimed as slaves, by persons being in other states, to bind themselves for different periods, not exceeding the age of twenty-eight years, by way of compromise with their masters: and, although we have no act of assembly, expressly authorising such binding, yet in cases where the right of the master is clear, or even where the law is doubtful, I am not prepared to say, that the indenture is void. It is true, that by the Common Law of England, an infant cannot bind himself for a period beyond the age of twenty-one years. But the Common Law of England, where slavery is not known, is not strictly applicable to the United States, where slavery is permitted by law. It is a sound principle, that an infant may make a contract for his own benefit. Now, nothing can be more to his advantage, than to commute a state of slavery for servitude till twenty-eight years. If such indentures are void, the consequence will be, that all persons residing in other states, who may find their slaves in this state, will appeal to the strict law; and if their claim is established, they will take their slaves home, and hold them as slaves for life. These compromises, especially, when the negro has acted under the direction of the Abolition Society, or any of its members, ought, if possible, to be supported. I have said, that there is no act of assembly, expressly recognizing an indenture to serve till the age of twenty-eight years. But the act for the gradual abolition of slavery, (sec. 13.) does, by necessary inference, affirm the validity of indentures by which an infant has covenanted to serve till twenty-eight years. It seems, from the 12th section of that law, that the Legislature had in view the case of negroes brought into this state from other states, under indenture. But the words of the 13th section are general, nor do I know that any judicial construction has yet been given, by which they have been restricted to persons brought into this state from

other places. It is unnecessary, however, to commit myself by an opinion on that point, and therefore, although I have thrown out these sentiments, I give no opinion. Silva was not free by the acts of assembly of Pennsylvania when she executed the indenture, because her mistress did not come to this state with a view of settling in it, nor had she been six months in it, at the date of the indenture. But the case turns upon the act of Congress, passed the 2d of March, 1807. (9 Laws U.S. 262.) Mrs. L's counsel has argued, that upon a fair construction of that act, the mistress's right to the property of the slave, was not affected, because she was not imported for the purpose of being sold within the United States. What the opinion of Congress would have been, had they foreseen a case of this kind, it is impossible to say—we must take the law as it is. The title of the act is, "To prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the 1st of January, 1808." Nothing can be plainer than the intent here expressed; and in conformity to it, the first section enacts, that from and after the 1st of January, 1808, it shall not be lawful to import or bring into the United States, or the Territories thereof, from any foreign kingdom or country, any negro, mulatto, or person of colour, with intent to *hold, sell, or dispose* of such negro, mulatto, or person of colour, as a slave, or to be held to service of labour. The 2d and 3d sections, and first part of the 4th section, inflict penalties and forfeitures for breaches of the law, and the latter part of the 4th section declares, "that neither the importer, nor any person or persons claiming from or under him, shall hold any right or title whatsoever, to any negro, mulatto, or person of colour, nor to the service or labour thereof, who may be imported or brought within the United States or the Territories thereof, in violation of this law." The only question then, is, was Silva imported in violation of the law? It appears to me, that she was imported clearly in violation of the letter and spirit of the first section. From the facts which have been proved, I must suppose, that she was imported for the purpose of being held by her mistress, as a slave, and she was actually so held, from the Spring till August 1809. This being the case, how will the indenture stand? There is no evidence that

Silva had the assistance of friends or counsel, or that she had any idea of a right to freedom, except that was derived from the deed of manumission, which bears the same date as the indenture, and must be considered as having been executed immediately before it. Taken together, these two instruments form one *transaction*. Thus situated, an ignorant girl binds herself to serve for thirteen years, for no other consideration than, meat, drink, washing and lodging. No education is to be given, no art, trade, or useful business, to be taught—she is not even to receive freedom dues.—On what principle can such an indenture be supported? Can it be said that the infant receives any benefit from it? It was determined in *Commonwealth vs. Keppel*, 2 Dall. 197, that an indenture from an infant, living in the state, to serve till the age of fifteen years, even with the consent of his guardian, was void. That was the case of a white child: but there is no authority or reason for making any distinction between black and white; except it may be in the case of compromise, which I have before mentioned. I am therefore of opinion, that the indenture was void, and the prisoner must be discharged.

CIRCUIT COURT OF THE U. S. NEW YORK.

**Schooner Enterprize and cargo, John Yellowly,
claimant appellant.**

versus

The United States, libellant respondent.

This was an appeal from his honour Judge Talmadge, in the New York District court of the United States, condemning the schooner Enterprize and cargo, for having been laden in the night without a permit from the collector or the inspection of a revenue officer. The clause of the law under which the condemnation in the district court had been pronounced is the second section of the third supplement to the Embargo act, and is in the following words :

“ And be it further enacted, that during the continuance of the act laying an embargo on all ships and harbours of the United States, and of the several acts supplementary thereto, no ship or vessel of any description whatever, other than those described in the next preceding section, and wherever bound, shall receive a clearance, unless the lading shall be made hereafter, under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties and forfeitures, as are provided by law for the inspection of goods, wares and merchandize, imported into the United States, upon which duties are imposed, any law to the contrary notwithstanding ; provided that nothing herein contained shall be construed to affect vessels laden in whole or in part, on the receipt of this act by the respective collectors.”

From the decree of condemnation, an appeal to the Circuit Court of the United States was entered by the claimant ; and

the appeal came on to be argued before his honor Judge Livingston. The cause was argued by Mr. Sanford, the district attorney, on behalf of the United States, and by Mr. Griffin as counsel for the appellant.

The facts being admitted, the attorney of the United States contended that the penalty for loading in the night season, or even in the day time without a permit from the collector, was the forfeiture of both vessel and cargo. That although the forfeiture of vessel and cargo, was not declared in so many terms by the foregoing section of the supplement to the embargo act, yet that it clearly intended to refer to and adopt certain of the regulations and penalties contained in the collection law; and that the regulations and penalties thus referred to and adopted are to be found in the 50th section of that law; which in substance provides, that goods, wares and merchandize imported into the United States from a foreign country shall not be unladen or delivered in the United States but in open day, except by special license from the collector, nor at any time without a permit from the collector; and punishes every person who may be engaged in the prohibited unloading of such foreign goods, wares, or merchandize, with a forfeiture of four hundred dollars respectively, and a disability to hold, any office of trust or profit under the United States for a term not exceeding seven years; and directs the collector of the district to advertize their names in a public newspaper; and subjects to forfeiture the goods, wares and merchandize so unladen; and further declares that if the value of such goods, wares or merchandize shall amount to four hundred dollars, the vessel from which they are unladen, with her tackle, apparel and furniture shall be subject to the like forfeiture.—The Attorney of the United States stated that the construction of the law for which he contended, had received the judicial sanction of most of the district courts in the United States.—That in this district in particular, a number of condemnations had been pronounced under circumstances similar to those of this case, in all of which the adverse counsel had acquiesced, except in those where his present client was engaged.—That the question now agitated was one of great importance, as by far the major portion of seizures under

the embargo laws, had been made under this very section. The Attorney of the United States concluded his argument by expressing a very confident expectation that the decree of the district court would be affirmed.

The counsel for the appellant observed that as the cases alleged to have been decided in other districts of the United States did not come before the court in the definite form of regular reports, it was impossible for him to answer or explain them.—That they might or might not, have corresponded in all their parts, with the case now in controversy. That this district, as he was well aware, abounded with condemnations under this section of the law ; but that in all of those cases where he was engaged, he had entered his protest against their authority by an immediate appeal—That if the other counsel engaged in similar prosecutions had omitted to pursue the same course, he was confident, from his knowledge of the sentiments of those gentlemen, that the omission had not arisen from their conviction of the correctness of the condemnations—That their client, already deprived of their vessels and cargoes probably of their all, by the rigor of the law, rendered more rigorous by judicial interpretation, might have been unable to find the necessary security for the prosecution of appeals ; or they might have shrunk from a contest, where they were threatened not only with the loss of the property in controversy but also with the most formidable *personal* disabilities and penalties. Under these circumstances, the counsel for the appellant trusted that the cause would come before this court, unprejudiced by what had been said to have taken place elsewhere. He was anxious that the question should be fairly met, and decided on its merits.

He contended that the only consequence of lading a vessel contrary to the provisions of this section of the law, was the *refusal of a clearance*.—That the subject of a clearance was the thing chiefly in contemplation of the Legislature in the sections immediately previous and subsequent, as well as the one in question. That in this section, there was no absolute prohibition against lading a vessel in any manner which the owner might elect ; but simply a provision that if the lading was not under the inspection of a revenue officer, the vessel should be deprived of the privilege

of a clearance.—That the construction is harsh and to be avoided, which imputes to the Legislature an intention of converting into a crime, the exercise of the privilege which every citizen enjoys of employing his vessel as a store house, or for any purpose not immediately connected with navigation, whenever he pleases, without permission from any revenue officer whatsoever.—But that the argument of the opposite counsel not only imputes this intention to the legislature, but also supposes that the legislature intended to attach to this new created crime, the most severe set of penalties to be found in the whole range of our revenue system;—and that under this section, if a merchant, from motives of convenience; and perhaps with no design to depart from the wharf, has the audacity to place a single article on board his vessel without the permission and superintendence of the revenue officers, he is not only liable to enormous penalties and forfeitures, but is also under a seven years disability, to hold any office of trust or profit in his country, and is, in the meantime to be advertised in public newspapers as a culprit and outlaw! That if such an intention indeed possessed the minds of our national legislature, they had not, fortunately for the honor of the country, ventured to express it in clear and intelligible language: the despotic mandate had been happily couched in terms of so much darkness and mystery, that our courts were not bound to understand and enforce it.

The counsel of the appellant insisted on the rule of the common law that *penal statutes are not to be construed strictly against the accused*, nor was he aware of any privilege which the embargo act and its supplements could reasonably claim to be exempted from the operation of this benevolent and wholesome maxim. But if any forfeitures over and above the penalty of being refused a clearance, are created by this section, what are those forfeitures?—and from what part or parts of the collection law, are they to be taken? That the answer of the attorney of the United States on this subject, ought to have been very explicit and satisfactory; for although it be admitted that a penal statute may by reference incorporate and adopt the penalties and forfeitures of some other penal law, yet that the terms of such reference and

adoption should be exceedingly clear and unequivocal. That the attorney of the United States had referred to the 50th section of the collection law, as containing the restrictions, regulations, penalties and forfeitures intended to be adopted by the clause of the embargo law now in question. But that it would be borne in recollection that the clause now in question speaks of such restrictions, regulations, penalties and forfeitures "as are provided by law for the *inspection* of goods, wares and merchandize imported into the United States," and that it will be found on examination that the 50th section of the collection law treats, not of the "*inspection*" of goods, wares and merchandize, but of their unloading and delivery; and that neither the word "*inspection*" nor any word of corresponding import, is to be found throughout the whole section; nor could the counsel for the appellant discover the semblance of a reason why the 50th section of the collection law was thus endeavored to be pressed into the service of the embargo acts and its supplements, except that there was no other part of the collection law which could be tortured into a bearing on the subject, and except also that the 50th section of that law is more rigorous in its penalties and denunciations than any other portion of our antient revenue system.—The counsel for the appellant concluded by observing that the language of the Legislature is involved in such obscurity as at least to leave room for *doubt*; and that in the construction of the criminal or penal laws, doubt should be tantamount to acquittal.

His honor the Judge, after holding the cause under advisement for several days, delivered a very luminous and able opinion, in which he took an extended view of the whole subject, declaring it to be very questionable whether the Legislature intended to attach to vessels lading otherwise than in the prescribed manner, any penalty except that of being refused a clearance;—but that if it was indeed the intention of the Legislature to superadd other penalties and forfeitures, they had not adopted that clearness of phraseology which would authorise the court, consistently with the established rules which are to govern the construction of penal statutes to carry such intention into effect. The judgment of the District Court therefore is reversed.

LAWS OF KENTUCKY.

The manner of authenticating Foreign Deeds, Records, and other Instruments in Writing, so as to make them evidence.

In the month of February, 1798, the Legislature of Kentucky, taking into consideration, that the intercourse between that State and the other States in the Union, and with foreign nations had become more considerable, so as to render it necessary, that some mode should be adopted to give authority to deeds and other instruments in writing, foreign judgments, specialties on records, registers of birth and marriages, made, executed, entered into, given and enregistered, by and between persons residing in any of the United States, or in any foreign kingdom, state, nation or colony, beyond sea and out of the jurisdiction of the state, enacted,

That all such deeds, if acknowledged by the party making the same, or proved by the number of witnesses before any court of law, or the mayor, or other chief magistrate of any city, town or corporation of the town or county, in which the party shall dwell, certified by such court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, having annexed thereto the attestation of the clerk, and the seal of the court, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form; and all policies of insurance, charter parties, powers of attorney*, foreign judgments, specialties on

* Powers of Attorney for confessing, or suffering judgment to pass by default, or otherwise, and all general release of error before action brought, are null and void.

December, 1799. §7.

record, registers of birth and marriages, as have been, or shall be made, executed, entered into, given and enregistered in due form, according to the laws of such state, kingdom, nation, province, island or colony, and attested by a notary publick, with a testimonial from the proper officer of the city, county, corporation or borough; where such notary publick shall reside, or the great seal of such state, kingdom, province, island, colony, or place beyond sea, should be evidence in all the Courts of Record within that Commonwealth, as if the same had been proved in the said courts.

Bills of Exchange in Kentucky.

Where any foreign bill of exchange, which may be drawn for any sum of money, expressing that the value has been received, shall be protested for non-acceptance or non-payment, it shall carry interest from the date until paid, at the rate of 10 per cent. per annum. But no person shall pay more than eighteen months interest from the date to the time it is presented protested, to the drawer or endorser.

The holder of such protested bill, may prosecute an action of debt for the principal, interest and charges of protest, against the drawers and endorsees jointly or separately, and judgment shall be given at the rate of 10 per centum per annum, as aforesaid, to the time of such judgment and legal interest upon the money recovered, until paid.

Such bills, after the death of the drawer or endorser, are considered as of equal dignity with a judgment, and his executors or administrators shall suffer judgment to pass against them for debts due on protested foreign bills of exchange, before any bond, bill or other debt of equal or inferior dignity, under the penalty of paying the same out of their own proper goods.

The protest may be made by a notary, or if there be no such, by any other person, in presence of two or more credible persons: and the drawer, such protest being sent to him, or notice thereof in writing being given to him, or left at the place of his usual abode within fourteen days thereafter, shall pay the money men-

tioned in the bill, with legal interest from the date of the protest : and he to whom the bill shall be payable, neglecting to procure the protest to be made, or due notice thereof to be given, shall be liable for all costs and damages accruing thereby. If the bill be lost or mislaid, the drawer shall assign another, upon being indemnified.—This applies to bills drawn in Kentucky upon persons residing within the state.

If any person draw or endorse a bill upon any person out of the state, but within the United States, and the same be returned unpaid with a legal protest, it shall be paid with legal interest from the date of the protest, charge of protest and damages, at the rate of ten per cent.

Nothing in this law shall authorise a recovery of money from the endorser of a protested bill, unless the holder shall have given the endorser a reasonable notice in writing of such protest.

February, 1798.

INTEREST.

When partial payments are made of bonds, contracts or assurances for money, goods or property, that bear legal interest; the interest that has then accrued, shall be first credited, and the balance of such partial payments, be placed to the payment of the principal.

December, 1799.

ALIENS.

Any alien, other than alien enemies, who shall have actually resided within the Commonwealth of Kentucky two years, may, during the continuance of his residence after the said period, be enabled to hold, receive and pass any right, title or interest to any lands or other estate, known within the commonwealth, in the same manner as citizens may do.

December, 1800.

FORM OF A TURKISH POWER OF ATTORNEY.

*Translated from a genuine document, for the American Law
Journal.*

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The poor before the Divine Majesty (be his memory exalted) MOHAMMED, the Son of *Ahmed Aboul Sou-eud El Mouthalana*, in the District of Alexandria, (the well preserved) May God grant him mercy ! (a)



(Given) in the Tribunal of the most beautiful law, and in the assembly of the most resplendent Sect, in the Island and District of Alexandria, which God preserve from all disgrace.

In the presence of our Master, his lordship, the legal Judge, who is of the sect of *Anefy*, now Inspector of the Judgments in the said district, who has above affixed his seal and signature : God

(a) All this is the Judge's signature, which is affixed at the top ; hence it is said afterwards, the *above written*, and not, as with us, the *undersigned* Judge.

maintain him in his elevated rank ! Personally appeared the magnificent among his countrymen, *M. Joseph Camas Suter*, Consul-general of Spain, in the said district, who being personally present in the above mentioned assembly of testimonies, has certified against himself, of his own free will, without being in any manner constrained to what is hereinafter set forth, (which makes this attestation the more legal and proper) that he has appointed to be his attorney and Lieutenant in his place and in the place of his person, *Mr. Michael Thalamas*, in order that he may act in his place as his substitute, in all matters, circumstances and business that may concern him in the city of *Berouth*. Now, he has appointed him to fill his place, according to the tenor of the bull and noble *firman* ; (a) giving him a general and absolute procuration concerning any thing whatever that may belong to the Consular office, and has constituted him in his place and stead ; acknowledging all that he may say or do, and he has conferred upon him every power which the law requires in similar cases, with with the most complete permission ; as as he has declared and protested ; which declarations and protestations are juridically acknowledged sufficient for similar things. And his testimony on this subject has been affirmed against him, in the presence of the above written Judge, our Master, who has decided agreeably to this testimony, confirming the same and giving it the form of a judgment according to the form prescribed by law.

This has taken place and been written on the fifteenth day of the month of *Djoumad*, (first of August) one of the months of the year 121, (1804).

(a) The Sultan's *Exequatur*.

NOTES OF CASES

*Decided in the General Court of Maryland.**

HON. JEREMIAH T. CHASE, *Chief Justice.*

JOHN DONE,

RICHARD SPRIGG,

} *Justices.*

Dixon Slade and wife, *versus* Robert Morgan,

MAY TERM, 1808.

This was an action of Debt on a Testamentary Bond, to recover a legacy.

The defendant pleaded a general performance, to which there was a replication on the part of the plaintiff; a rejoinder, no assets and payment: surrejoinder, assets and non-payment.

THE plaintiff contended, that according to the pleadings, it was incumbent upon the opposite party to show that he had legally discharged himself from the claim. Swinb. Test. 420, and 14 Vin. 466. tit. "Inventory" were cited, that a legatee shall recover of an executor who has returned no inventory.

For the defendant, it was urged that proof of assets lay on the plaintiff, whether a legatee or distributee; and that a defendant could not be put to prove a negative. The Court was prayed for a direction, that before the plaintiff could recover in this action, he must prove assets in the defendant's hands: which direction the Court refused to give.

The defendant then offered to prove, that nothing came to his hands, except evidences of debts, which were afterwards paid to

* From the Notes of the late Judge Sprigg.

him in Continental money. But *per Cur.* this evidence is inadmissible. Under the plea of *payment*, the defendant's account of payment made by him was admitted: and if proved, would have been received by order of the Court.

Verdict for the Plaintiffs.

Martin for plaintiffs: *Johnson & Hollingsworth* for defendant.

Beall v. Beall, *Adm. of security to Testamentary Bond.*

An action of Debt on a Testamentary Bond to recover a distributive share after payment of debts. General Performance and Limitations. Replications: Rejoinders: Payment, &c.

No account was settled in the Orphans' Court, by the Executrix, but other evidence was admitted by the court of payment of debts by her.

The defendants offered a copy of a judgment against *Sarah Beall*, (not *Sarah Beal*, executrix); and parol evidence that it was recovered on a debt of the testator.

The Court thought parol evidence that the testator owed a sum of money, which the Executrix had since paid, was admissible: the admission of the Executrix, on which judgment may have been entered in a Court of Law, in her own name, is not evidence against her.

Verdict for Defendant.

Shaaf & Johnson, for plaintiff: *Mason*, for defendant.

Stephen B. Gill, vs. Giles Cole.

An action of trespass, brought 31st March, 1801, for removing a fence. The plaintiff had recovered land from the defendant, by a judgment in ejectment in this Court, which judgment was

afterwards affirmed in the Court of Appeals. During the pendency of the writ of Error, the defendant had removed the fence from the land. It was admitted that the plaintiff had brought an action in July 1801, against the defendant in the Baltimore County Court, of trespass for mesne profits from 10th June 1793 to 29th October 1800: and judgment was confessed, Nov. 1802, for 30 dollars.

The defendant contended, that this recovery was a bar to the present action; and *Run. on Eject.* 164-6. was cited to prove, that trespass for mesne profits is commensurate with all injuries done, or profits withheld, during the time laid in the demise.

But the Court were of opinion that in an action for the mesne profits, the plaintiff recovers damages for the use and occupation of the land; and that a recovery in such an action, is no bar to an action of trespass for a trespass committed during the time for which the recovery was had for the mesne profits: the Court were also of opinion, that the removal of the fence in this case, was a trespass, unless it should appear to the jury, that such removal was necessary for using and cultivating the land, and was made for that purpose.

Verdict for the Plaintiff.

P. B. Key, for plaintiff: Hollingsworth, for defendant.

Gaither, *ad sectam* of certain Negroes.

This was an appeal from a decision of the County Court of Anne-Arundel.

A deed of manumission under the act of 1752, (included in the act of 1796) had been executed in the presence of two persons, one of whom signed it as such, but the other did not. This was held a good deed.

But *per Curiam*, Two witnesses at the execution and subscribing the deed, as such, are necessary.

Judgment below reversed:

Ringgold's Lessee, *vs.* Cheney.

Ejectment. Defence on Warrant. This action was brought to recover Lot No. 2, part of Conicocheague Manor. 3d *November*, 1768, a patent for this manor issued to John Morceton Jordan, under whom the Lessors of the plaintiff claim. Defence for "Cheney's Delight," and "Long looked for come at last." 16th July, 1752, a warrant issued. *Nov.* Certificate returned, land called Cheney's Delight. 17th April, 1762; the composition money was paid. No patent was issued, because it was believed to lie within the reserves of Conicocheague manor. 21st December, 1769, certificate for "Long looked for come at last." 1st July, 1771, a patent issued for forty-one acres.

The defendant protected himself under adversary possession.—Witnesses proved possession between twenty and thirty years, and by inclosures for part, as marked on the plat, for more than 20 years: that Jordan, and Ringgold, his grantee, had claimed part of Cheney's Delight, as within the lines of Conicocheague Manor: had seen Ringgold, whose will was proved in 1774, on the manor.

The defendant, to have the benefit of a bill of exceptions, then prayed the Court to direct the Jury that possession for 20 years of the *uninclosed* land defended, was a good bar against a legal title in the plaintiff.

But the Court said, nothing but adversary possession, by actual inclosures, would bar a *legal* title.

The plaintiff gave up the land inclosed, and took a verdict for the residue.

 Lodge & Co. *vs.* —.

Per Cur. Indebitatus assumpsit will not lie against an heir for debt of his ancestor.

Non Pro.

OPINION BY LUTHER MARTIN, ESQUIRE,

ON A

COVENANT OF WARRANTY.

It is stated to me that William Dudley supposing himself to be seized in fee ; and being supposed to be so seized of certain property, did in his life time and shortly before his death mortgage the same to Thomas Williams for an amount nearly equal to the then value of the said land, and died intestate and insolvent ; that in consequence Thomas Williams and Joseph Williams took out Letters of Administration on his estate. It is stated that in Massachusetts the administrators of an insolvent estate have the management of the *real* as well as the personal estate ; that they may alien the real estate of such insolvent, which are liable to his debts, under a permission of court granted upon application. It is further stated that Thomas Williams, to whom the said property was mortgaged, did convey all his interest and title by virtue of the said mortgage, to Increase Sumner and wife ; and that supposing there was an equity of redemption remaining in said Dudley, at the time of his death, under the direction of the court, the administrators did sell that supposed equity of redemption to Sumner and wife, for 305*l.* 5*s.* Massachusetts currency : circumstances are stated with regard to the situation of the records to free all parties from imputation of fraud ; and the deeds executed are stated to have been drawn by, or corrected by Sumner, a great legal character ; whereas the grantors are stated to be persons without particular legal knowledge.

No. XIII.

R

It is further stated that the heir of William Dudley, discovering that the lands aforesaid were held by his father in fee-tail, and not in fee simple, as William Dudley supposed, has recovered from Mrs. Sumner the lands in question ; and that in consequence Mrs. Sumner has commenced an action or actions of covenant, of some kind, to recover against Thomas Williams and Joseph Williams one or both ; and that she founds her right of recovery upon the deeds thus executed, the monies paid in consequence, and the warranties or covenants therein contained.

And I am requested to consider the subject, and, as far as in my power, give an opinion—Whether she has a right to recover any thing ; and if so, to what extent has she a right to recover ?

Upon the case so stated, if Mrs. Sumner has a right to recover, it must be founded upon actual warranty made, which may operate as a real covenant, and on which the writ of *warrantia chartæ* may be issued, and on which if real actions had been brought against Mrs. Sumner she might have vouched the grantor or grantors to warranty—or it must be on such words in the conveyances, as will operate as personal covenants, on which personal suits may be brought, and damages only obtained. Or she must be entitled to recover upon an equitable principle, that having paid money, and the consideration for which it was paid having failed, she ought to recover back the money so paid.

I will examine the subject under each point of view.

And here it will be necessary to distinguish the case as it relates to Thomas Williams the mortgagee, and to the same Thomas and Joseph as administrators of Dudley. For Thomas alone sold to Sumner and wife the legal estate or interest under the mortgage. For this transaction and its consequences Joseph is in no manner answerable.

Thomas and Joseph as administrators conveyed a supposed equity of redemption, which was thought to have remained, after the said mortgage, in the said Dudley. This was their joint act, and for the consequences of *this act* they are jointly answerable, if answerable at all.

First then as to the deed by Thomas Williams, Dudley had conveyed to him in fee, but to be defeasanced by the pay-

ment of a sum of money. This deed operated to give to the said Thomas Williams a determinable or base fee, liable to be defeated by the entry, or action of the heir in tail.—Vide Co. Lit. 331. Hargrave's notes with the authorities there cited.

Thomas Williams had therefore, when he sold and conveyed to Sumner and wife, a base fee, and, had not the issue in tail entered and brought suit within the time limited, this fee would have become undeterminable; and Mr. Sumner and wife would have had an indefeasible estate.

Thomas Williams by his deed conveys and makes over "the above recited deed and bond" that is the mortgage deed and Dudley's bond "together with all the right, title, interest and estate in and to the same, which he had in his own right in and to the same, and to the lands in the said deed described," he afterwards covenants with Sumner and wife, "that said premises are free and clear of all incumbrances by him the said Thomas or by his knowledge made saving and excepting, &c.

He further covenants "that neither himself, nor any person with his procurance or consent will do any thing to invalidate the aforesaid deed or bond, but that they may remain as a part of the title to the said described premises," &c.

In this deed therefore there is nothing, which indicates the intention to transfer any thing but the interest he might have, be that what it might, and the covenants only to go to his own acts.

Should it be suggested that the words "give and grant" create by legal construction a warranty for the life of the person, I answer that on such warranty the only remedy Mrs. Sumner could have, would be by the writ of warrantia chartæ, and not by personal action of covenant for damages. But what is conclusive, when in a deed, containing the words "give and grant," there is an *express special warranty*; this shall controul what would be the legal effect of the words "give and grant," if they were not accompanied by such special warranty;" for the insertion of an express covenant on the part of the grantor will qualify and restrain its force and operation within the import and effect of that covenant, as the law, when it appears by *express words* how far the

parties meant the warranty should extend, will not carry it further by construction.

Vide Co. Lit. 383—Hargrave's note, 232.

On the deed therefore given by Thomas Williams to Sumner and wife, no suit can be sustained against Joseph Williams, because he was no party thereto. Nor can any writ of warrantia chartæ be brought to recover lands in value, because, though the words, "give and grant," if they stood alone would justify such remedy, yet being qualified by the subsequent engagement, which not only shews that the said Thomas meant to convey only his own right, but likewise meant to confine his warranty to his acts, their words are restrained and such remedy cannot be had.—Nor can, I presume, any action of covenant, as a personal action for damages, be founded upon the said deed, because, as he covenants only against his own acts, and, as I believe, it is not suggested that he has done any act in violation of his covenants, no breach can be shewn on account of which damages ought to be recovered.

The next question then upon this conveyance made by Thomas Williams to Mr. and Mrs. S. will be whether, as he received 540*l.* 2*s.*, as the consideration for his interest so conveyed, and as by the recovery under the title of the heir in tail, that consideration is defeated, Thomas Williams is not answerable for the consideration money?

It has been determined, that in many cases, where money has been paid for a consideration which happens to fail, it may be recovered back.

Shore vs. Webster 1 Term R. 732 was the case of money paid for an annuity, which was not duly registered.

Brigg's case, *Palmer* 364, cited in *Esp. Nisi Prius*, was where money was paid to defendant on a promise to make her a lease of land, and before the lease made the defendant was evicted, and consequently could not make the lease promised.

With regard to real and personal property there is certainly a wide difference; whoever having personal property *in possession*, sells it as his own, is thereby considered as warranting the proper-

ty, and if it is recovered from the purchaser he may have his remedy against the vendor.

Lord Raymond 593—Salk. 210. 3 Mod. 261.

Possession of personal property is considered as the *indictum* of title;—But it is there determined to be different as to real property, because there the purchaser may search into the title; and *caveat emptor* is there the rule. Rd. 593. Sd. 210.

Co. Litt. 102a states “that, tho’ by the civil law every man is bound to warrant the thing which he selleth or conveyeth, albeit there be no express warranty, yet the common law bindeth him not, unless there be a warranty in deed or in law; for *caveat emptor*.”

As to the sale of real property, although, if the want of the title of the seller is discovered before a conveyance executed, and while every thing is *in fieri*, that is before the final conveyance, money paid may be recovered, yet it seems settled, that after conveyances actually made and accepted, if the land is evicted, and the deed contains no warranty or covenants, on which suit may be brought, the purchaser is without remedy.

And the reason appears clearly to be this, it is presumed that in such case, the purchaser sought into, and was satisfied so well with the title, that he was willing to take the property at his own risk, and not to hold the seller answerable, as otherwise he could have had in the *formal* final contract, that is the deed, the provision made, which would stipulate the liability of the seller, in case the land was evicted. The law upon this subject is discussed in Evans’ Essays, action for money, &c. Cap. 2. Sec. 3. Fonblanque Book 1st. Cap. 5. Sect. 8th.—In the note at the beginning of the 8th section, page 370, Fonblanque takes the distinction between where the consideration fails, or is discovered to fail, *before* the agreement is *mutually performed*; and where it is discovered *after* the agreement is mutually performed. If the failure of consideration is discovered before the mutual performance, then equity will interpose and relief may be had; otherwise not.

Now an agreement for the sale of lands is not *mutually performed* until the purchaser hath paid his money, and the seller conveyed the land.

Therefore if the purchaser hath paid his money, but before he takes a conveyance, discovers that the seller cannot make a title, he may disaffirm the contract and demand back his money. So also if after *taking the conveyance* from the seller, before the purchaser pays the money, he discovers that the conveyance to him executed will not give him a title, he may apply to a Chancery Court to relieve him from the purchase, and from payment of the purchase money. This was exactly the case in 2d Chan. cases 19, which I have not seen; but, it is cited in Fonblanque. There the money had never been paid; the contract or agreement *had not been mutually performed*. But had the money been *paid by the one*, and the land *conveyed* by the other, then the contract or agreement having been mutually complied with, neither the one nor the other would have any rights or remedies against the other, but what arose from the deed executed between them.

This is perfectly consistent with the idea expressed by Fonblanque, that equity will not alter nor extend the agreement of the parties, where those agreements have been *mutually complied with*, and final instruments of writing, for which the agreements were preparatory, ultimately executed, and that the acts done which were to accompany those final instruments, or to be consequent thereon did not give any particular remedy.— And this distinction reconciles all the authorities. For the rule of caveat emptor doth not extend to prevent the purchaser, if he discovers defect of title even after the conveyance but before payment of money, from applying to a court of equity for relief. It only extends to the case where the agreement has been *mutually executed*, that is where the *money has been paid* and the *conveyance given*; in which case the purchaser shall not have any remedy to recover back the money, unless by reason of warranties or covenants in the *deed*, by virtue of which he may be entitled to remedy.

I will in addition observe, if, where the deed contains no warranty on which a Warrantia Chartæ could be brought, or covenants for the breach of which personal damages might be recovered, the purchase money could be notwithstanding recovered, should the lands be evicted, it puts an end to all distinction between gen-

eral and special warranties, or between covenants general and special; as upon such principle, the purchaser is entitled to his remedy, on an eviction, though his deed doth not contain any warranty, nor any covenant whatever.

I will here also refer to the case of Joseph Johnson *vs.* John Johnson, 3d Bos. & Pul. Reports, in which the plaintiff recovers 300*l.* paid for lands, where the title could not be made good. Lord Alvanley, the Chief Justice, says (page 168) "The flaw therefore being discovered *before the purchase was completed*, there is no pretence that the plaintiff bought the estate, and that having obtained the title for which he had contracted, he must abide by the consequences." And in page 170 his Lordship says explicitly, "we by no means wish to be understood to intimate, that where under a contract of sale a vendor *doth legally convey* all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. every person may protect his purchase by proper covenants; where the vendor's title is *actually conveyed to the purchaser* the rule of *caveat emptor* applies." As to myself, where conveyances have been actually executed, tho' the land have been subsequently evicted; I never in the course of my practice have known a suit supported by the purchaser to recover back the purchase money, as for money had and received to his use. But if there were not contained in his deed warranties or covenants, of which he could have the benefit, the rule of *caveat emptor* has been considered to apply, and the purchaser has suffered the loss.

I think it may fairly be concluded, that if no action can be supported against Thomas Williams on some warranty or covenant in his deed to Sumner and wife, no action of any kind can be supported against him.

Unless indeed:

It can be established that Thomas Williams at the time he conveyed to Sumner and wife *knew* that his title to the land was defective. In that case the law will consider him guilty of a fraud; and he may be proceeded against either in a court of Chancery, whose particular province it is to examine into and relieve in cases of fraud.

Or he may be sued in law, in the equitable action of *assumpsit*, for money had and received.

Vide Douglas 657, the case of *Bree vs. Holbeach*. Skinner 412. Salk. 22.

But whether the procedure is by bill in equity, or by the equitable suit at law, no consequential damages can be recovered. Nothing can be recovered but the actual purchase money paid, and even that, according to some authorities, without interest. And though the thing purchased has increased in value, yet the purchaser shall only recover the sum actually paid.

In the case of *Moses vs. McFarlane*, 2 Burrow 1006, Lord Mansfield declares, that "the action for money had and received is in the nature of a bill in equity;" page 1008 "founded on the equity of the case, that the defendant may refund the money he received;" page 1010, "in this form of action, plaintiff *sues for the money only*" (*ibid*) "the suit is equally beneficial for the defendant: it is the most favourable way in which he can be sued;—he can be liable no further than *the money he received*, and *against that* may go into any equitable defence," &c. (*ibid*.) Lord Mansfield cites the case of *Dutch and Warren*—explains that the action was grounded upon the *principle of fraud*; and expressly states, page 1012, "if in that case the shares had been of *much more value*, yet the plaintiff could *only* have recovered the 252*l.* 10*s.*—the sum which the plaintiff had *actually paid*, upon the contract, for the shares."—The case of *Johnson vs. Johnson*, 3d Bos. and Pul. 162, shows that the plaintiff only recovered the sum of money actually paid. So doth the case of *Ellicot vs. Edward*, 3d Bos. and Pul. 181, and in Evans' Essay on the action for money had and received, Cap. 9th—the same principle is supported; that no consequential damages can be recovered, nothing more than the money actually paid, and that without interest.

The same law as to not allowing interest is to be found in the case of *Walker vs. Constable*, 1 Bos. and Pul. 306.

I now come to the deed executed by Thomas and Joseph Williams, as administrators of the goods, &c. of William Dudley. It being supposed that William Dudley was seized of the lands in question in fee simple; it was also supposed that there remained an equity of redemption which was answerable for his debts, which would have been the case had Mr. Dudley been seized in fee simple, and hence under the direction of the Justice of the Court of Common Pleas they did sell that equitable interest as administrators to the same Mr. Sumner and wife to whom Thomas sold the mortgaged interest.

Under this sale nothing can cause Thomas and Joseph to be answerable in their own right, or out of their own estate, except the most clear and unequivocal engagement on their part, to the purchaser, that they would be so answerable. Where persons sell property as trustees, as executors, as administrators, as sheriff, as agents, in fact, in any manner, *en autre droit*, and are known to the purchaser to sell in such capacity, I believe there never has been one legal determination, or even a thought that the person so selling was answerable to the purchaser for the goodness of his title, provided the seizin or possession of the property had been in those in whose right they sold; provided also they were not notified and forbade to pay the money over. Was it ever heard that a trustee selling property under a trust, which was in the seizin and possession of him who created the trust, has been made answerable personally on account of the sale, though the title proved defective? Has there been a case where the sheriff, under a Fi. Fa. has taken property, which was actually possessed by the defendant and held as his property, and sold the same and paid the money over without notice, that the sheriff has been held personally answerable, though the article sold is recovered from the purchaser? Has there ever been a case where an executor or administrator has sold any kind of property belonging to the deceased, of which the deceased was possessed at the time of his death, and which was of that nature that the executor or administrator had in that character a right to sell, and has administered the money, that he has been made answerable on account of defect of title, or eviction, or recovery from the purchaser, unless the ex-

ecutor or administrator had notice before the sale, or before the payment?

It is decided that if an agent, who of course acts *en autre droit*, receives money for his principal, to which he was not entitled, and without notice pays it over, the agent can never be made answerable for the money—Vld. 4 Burrow 1985, Sadler *vs.* Evans—Bul. Ni. Pri. 133, Staplefield *vs.* Yewd.

I will not contend but that if a sheriff, having a *Fi : Fa :* against the goods of A. lay his writ upon goods of B. which were not in possession of A. he doth it at his peril; but I contend if the sheriff with such a writ executes property in possession of A. claimed and reputed as his own, sells them, and pays the money over without notice, the sheriff can never be made answerable. I may also admit that the sheriff, if he takes goods on his writ against A. which are in possession of A. but really belong to B. if B. claim them, and the sheriff will sell without an inquisition to justify his conduct, he may be answerable. I may admit also, that if the sheriff on the *Fi : Fa :* against A. has sold property belonging to B. which was in possession of A. and before he pays the money over, B. informs the sheriff of his right, and forbids the payment of the money, should the sheriff pay the money over, unless by the order of the court, on a hearing, he might be answerable.

So I may admit that if an executor or administrator should claim, and take into his possession, as belonging to the deceased, property not possessed by the deceased, or known to be claimed as the deceased's property, and disposes of the same, he might become answerable to the person whose property was thus wrongfully taken and disposed of; particularly if he is not informed the property belonged to the deceased, or if before payment he has notice, and afterwards pays the money over.

My principle is this; that persons in whatever character they act, who transact the business of others in disposing of property, and paying over the money to others, can not in any case be made personally answerable, notwithstanding that those for whom they acted had not a good title, provided they who made the sale had

not knowledge or information of the defect of title before the sale made, or at least before paying over the money.

And in addition to the examples already stated, I will add the case of a person who has a power of attorney from B. authorising him to sell a tract of land claimed by B. as his property. The attorney under this power sells, receives the money, executes a deed to the purchaser and pays the money over to B. all which he doth bona fide, having no knowledge or information that B's title was defective. Surely it never can be pretended that, should the purchaser be evicted, the attorney could be made personally answerable.

All these cases I consider analagous to each other.

I will next examine the deed to determine whether the said Thomas and Joseph Williams have by any clear and unequivocal engagement made themselves personally responsible.

And here I may be permitted to say, that where property is sold for the benefit of others, and the money arising from the sale is to go exclusively to the benefit of others, and not to the seller, it cannot be supposed the seller would make himself personally answerable, so that, should the property sold be evicted, he would be obliged to make compensation for it out of his own property, unless he were a fool or a madman. And this extreme improbability against such act being done is a correct criterion by which we may examine, and decide upon the act which has been done; I mean the deed executed by Thomas and Joseph Williams to Sumner and wife,

This deed begins by stating themselves to be "the administrators of all and singular the goods, chattles, rights and credits of William Dudley." This shows in what capacity they convey. They further, to prevent all mistake, declare that the conveyance they make is under a licence from the Justices of the Court of Common Pleas to sell the real estate, of which said Dudley died seized in fee simple; they state that under this licence they only sell the "equity of redemption," that Dudley had in the premises, which had been before mortgaged by Dudley to Thomas, and which mortgage was that day sold to Sumner and wife. It is therefore most explicitly stated, that the property they were convey-

ing, was not property in which they had any interest in their own right, but only as being administrators of Dudley, and acting for his creditors.

They declare that the sum of 305*l.* 5*s.*, the consideration money, was paid to them in *their capacity* of administrators; and that in their capacity of administrators, they had given, granted and sold the said equity of redemption. It is also *in their capacity of administrators*, that they covenant, "that they as administrators as aforesaid, were lawfully seized of the premises," (which cannot possibly mean any thing more than that they had letters of administration duly granted, and had a licence from the court to sell;) they could not, as administrators be seized in any other manner, as Mr. Sumner must have well-known. The next part of the covenant is *still in their capacity of administrators*, "that the premises were free and clear from all incumbrances by them, or with their knowledge made, saving and excepting; &c. This not only shows they acted merely as administrators, but is an additional proof they meant not to make themselves in their own right answerable for the goodness of the title. The next branch of the covenant which is also made in their capacity as administrators, is that they have "*in their said capacity*, good right to sell and convey the same." This cannot possibly be considered as going further than a covenant that they had regularly obtained letters of administration, and had obtained the court's license to sell; and Sumner could not but know that they had no other right to sell or convey.

The last engagement, and that which most probably is relied upon, is the following clause in the said deed; "and that as administrators as aforesaid we will warrant and defend the same to the said Increase Sumner and Elizabeth, their heirs and assigns forever against the lawful claims and demands of all persons." This is the concluding part of a covenant expressly in its *beginning* stated to be made by them as administrators; and in this concluding clause they expressly state that it is *as administrators aforesaid* they will warrant and defend, &c. The whole of their engagement must be taken together: and upon this principle this last clause cannot bind them further, than that if it should be dis-

covered that there was an adverse title, or should the purchasers be evicted, they would repay the purchase money to the purchasers out of the money or funds, which they might have in their hands as administrators. And had the defect of the title been discovered, or the eviction taken place, while the administrators had property of the deceased in their hands, probably the administrators would have been bound under this part of the covenant to have repaid the purchase money out of such funds. But they having paid away the money in due course of administration without any notice; are, I consider, like the agent, who recovers money for his principal and pays it over without notice, free from any claim against them.

To say that under this deed Thomas and Joseph shall be answerable in their own right, and pay out of their own property, is to declare that, when a person, acting as administrator, covenants as administrator, that as administrator he will warrant, it shall have the same effect and operation, as if he had acted in his own right, covenanted in his own right, and that he would in his own right warrant.

Why were the words "that as administrators they covenanted" and "as administrators they would warrant" inserted, but explicitly to show they meant not to make themselves answerable in their private capacity, or out of their private fortunes? And what possible motive could administrators have, to make themselves answerable personally, and out of their own fortunes, for the sale of their intestate's property, the proceeds of which they were to pay over to his creditors or representatives?

Here also let it be observed that not only in signing the instrument they sign it as administrators, but also in the acknowledgment they repeat it was done as administrators; and further that in no part of the deed is there introduced any covenant, which goes directly to the right that the deceased Dudley had in the land; I mean in no part of the deed is there any covenant or warranty, that Dudley had an indefeasible estate in fee simple in the land; or in fact that Dudley had a good title of any kind.

Why, I would ask, if they meant to be answerable in their own right, and be liable under that conveyance out of their own pro-

perty, should the title be defective, why, I say, all this waste of ink, paper and words, describing themselves from the beginning to the end of the instrument as being *only* administrators,—as acting only in that capacity?

There can be no question but that the expressions above referred to were inserted to hold up the idea that the administrators were not meant to be considered answerable to their own rights. There can be no question the administrators considered it in the same point of view; and if gov. Sumner who received the deed, meant notwithstanding, to hold them personally answerable, he practised upon them a deception and fraud, which, I presume, no person would wish to attach to his memory.

I will now produce some few authorities to show that where persons have acted *en autre droit*, and as agents for others, have been determined not to be personally answerable, though they have used much stronger language, from which it might be argued or inferred that the persons meant to make themselves answerable.

The first case I shall refer to is *M'Beath vs. Haldimand* 1 Term. R. 172 to 182; where it was determined that, as Haldimand acted in his capacity of governor, he was not answerable for goods supplied by the plaintiff under his direction. And the court there said it was of no consequence, as to their decision, whether the plaintiff could have any other remedy, or where he was to look for it. Justice Ashurst declares, page 181, "the true question must be what was *the meaning of the parties* at the time of entering into the contract." In our case, every word in the deed from Thomas and Joseph Williams shows their meaning to have been, that they were only to be answerable *as administrators*, and not *personally*; that they contracted not *personally*, but only as administrators. He also says that "no man would accept of an office under government on such conditions." So may it, with truth be said, no person would accept the appointment of executor or administrator, if, for all that property, which comes to their possession as belonging to the deceased, and which they sell, they should themselves, after having fully administered, be held an-

swerable out of their own property, should it happen that the title of the deceased to such property turned out to be defective.

Umwin vs. Wolsely, 1 T. R. 674, is also a strong case in favor of my construction. It was there determined that Wolsely was not answerable for the freight, because although he had executed the charter party himself, yet he had described himself in the premises, as "captain Wolsely, commander of his Majesty's ship *Magnanime*, &c. on account of his majesty, of the one part," and covenanted "that on account of the king he would," &c.

But it is believed, that the case of *Hodgson vs. Dexter* decided in the Supreme Court of the United States, and reported by Cranch 345, is conclusive on this point. In that report the lease to which Mr. Dexter was party is stated verbatim. Mr. Hodgson for money paid to him by Mr. Dexter makes him a lease for eight months to be held by him (who was not a body corporate) and his successors, with a covenant on the part of Mr. Dexter that *he* and his successors should and would at all times during the said term, keep or cause to be kept in good and sufficient repair the said demised premises, &c.

The house was burned down, *while he was Secretary of War*, and within the eight months, and, an action of covenant being brought, the court determined that, notwithstanding the words of the covenant, as he was in the premises called Samuel Dexter, Secretary of War, the word "said" in the whole lease, where his name was mentioned, should be as forcible in his favor, as if the words "Secretary of War," had been in each instance repeated; and that as to the signing and sealing, it being stated that the "said" parties have hereto, &c., it should operate as to Dexter, to the same effect as if he had signed "Samuel Dexter Secretary at War;" and that these circumstances, together with the use of the word "successors," were sufficient to show that it was the intention of the parties he should not be liable in his private capacity, or in other words that he was not to be *personally* answerable.

As to the word "successors," the court only availed themselves of it as indicative of the intention and understanding of the parties, that Mr. Dexter contracted only in his capacity of Secre-

ary of War. For in legal operation there can be no doubt, but that a lease to Samuel Dexter and his successors conveyed the same estate, as if it had been to Samuel Dexter, his executors and administrators. To prove this *Co. Lit. 46—Bacon's Abrid. Title Corporation Gwil. Ed. 2 Vol. 25, and 12 Coke 105, 106,* are sufficient.

The case then of Dexter was decided upon the principle, that it appeared Mr. Dexter did not mean to contract in his private and personal capacity, so as to be answerable out of his own property.

Will any person say that, the wording of the deed from Thomas and Joseph Williams doth not much more strongly prove, that they only meant to engage as administrators, and not to make themselves answerable out of their own property, or in their own right?

In the cases of Haldimand, Wolsely, and Dexter, had they been made personally answerable, the two first would have had the faith of the British government to have been repaid; Mr. Dexter would have had the faith of the government of the U. S. for his indemnification.

They therefore would have suffered but a temporary inconvenience. How much stronger then is the present case, where the proof that Thomas and Joseph Williams did not mean to make themselves personally answerable is infinitely stronger; and in which, should they be made answerable, personally, they have no redress.—Should it be said there is an equal hardship as to the purchaser, who may perhaps have no redress, I consider, it is one of those cases in which the rule of *caveat emptor* takes place; and that in the cases I have cited, particularly *Macbeath vs. Haldimand*, it was determined that it was of no consequence, whether plaintiff hath remedy against any other person, and that the only question was in what capacity did the defendant contract, and in what character was he answerable.

I shall now proceed to examine to what extent are Thomas and Joseph Williams answerable, if answerable at all.

I have already discussed this question as to the deed executed by Thomas for the mortgaged interest: I have endeavoured to show

that on that deed Thomas is alone answerable, and that he cannot be himself answerable, unless upon the ground that he was guilty of fraud,—and then only to the amount of the sum he actually received, perhaps with interest; this sum recoverable only by suit in Chancery, or the *equitable action*, for money had and received to the use of the purchasers. I have stated, what no person can doubt, that Mr. Joseph Williams cannot be in any manner answerable by that deed, because he was not a party thereto.

I shall therefore confine myself to a view of the deed executed by Thomas and Joseph Williams conveying the equity of redemption.

If they are answerable upon this deed, it must be because there are words therein which amount to a direct warranty, or words which amount to a warranty in law, or words which amount to a personal covenant, on which a personal action of covenant may be brought to recover damages only.

An express warranty may be, where it can exist, created by the word “warrantizo,” or in English “warrant” in its proper tenses and persons. The word “dedi,” or “give,” also may create a warranty by operation of law; but every reason, which I have assigned why the word “give” in the deed from Thomas Williams doth not create a warranty, equally applies in the case. However in the deed from Thomas and Joseph Williams, it may be said, the words “we will warrant” are actually inserted in the covenant, and therefore, the technical expression being used, there can be no doubt but in this deed there is an express legal warranty.

To this I answer a *warranty* cannot be created but by a conveyance which transfers a *legal estate* in the thing warranted, which must be of freehold or a greater estate, for to no other estate can it be annexed. Vid. Co. Litt. 101b—366a. 389a. Bac. Abrid. Gwil. Ed. 7 Vol. 226, 227.—These authorities show that a *warranty* can only be annexed to *legal estates* of freehold or inheritance; and can only be created by such legal conveyances, as convey a legal estate of freehold or inheritance. But what was transferred by the deed from Thomas and Joseph Williams to Sumner and wife? No legal estate;—Nothing but an *equity of redemption*.

tion. The whole *legal estate* was transferred by the deed from Thomas. Nothing remained in Dudley at his death, but a mere *equity of redemption*. That equity of redemption was all that his administrators did sell;— it was all they could sell. But to the transfer of a mere *equitable interest* no warranty can be annexed; which only can be annexed to a *legal estate* of freehold or inheritance.

But suppose, for argument's sake, the words used in the deed amount to a warranty, and that the estate thereby conveyed is such to which a warranty might be annexed; what is the result?

"A warranty concerning freeholds and inheritances," as this is, if a warranty at all, "is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and, either on *voucher*, or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those, which shall be evicted by a former title, else it may be used by way of rebutter." 7 Bac. Ab. Gwil. Ed. 225.—Co. Lit. 863a. and the authorities there cited.

As a *rebutter* the warranty might have been used had Thomas and Joseph Williams or their heirs brought suit to recover the lands conveyed from Sumner and wife or some person claiming under them, even though the plaintiffs claimed under a different title. (I mean supposing it operated as a warranty, and affected Thomas and Joseph in their own rights.) Had any action been brought against Mrs Sumner to recover the said property, of that nature in which voucher is allowed, her remedy would have been by vouching Thomas and Joseph Williams to warrant the same; and if the plaintiff recovered against her, she upon the voucher would have had judgment against Thomas and Joseph for other lands to the *value* of those evicted.

But as the suit brought against Mrs. Sumner was not of a nature in which Thomas and Joseph Williams could be vouched, and as the suit was not brought by those who could be *rebutted* by virtue of the warranty, it will follow, that if a warranty is created by the deed in question, Mrs. Sumner's remedy under that warranty is by a writ of *warrantia chartæ*; a writ which is supplementary

in place of voucher, where that cannot be had, and is in nature of voucher—Hobart 21—Roll *vs.* Osborne; and in which suit she would have judgment to recover *other lands or tenements* to the value of those evicted by a former title. See Co. Litt. 365a.

Thus then it appears that when a person can vouch by virtue of the warranty; and where not being able to vouch, the writ of *warrantia chartæ* is resorted to as supplementary in place of voucher, the person who has the benefit of the warranty recovers *other lands or tenements* to the value of those evicted. It is scarcely worth while here to observe that when the warranty is used as a rebutter, *nothing is recovered*, but the *plaintiff* is prevented from recovering the lands to which the warranty is annexed.

Here in the course of the investigation it is important to ascertain what is the *value* which is to be recovered;—or in other words how is that value to be ascertained, or to what time is it to relate?

And here I lay it down as clearly established, that the value to be recovered either on voucher, or on the *warrantia chartæ* is the value of the lands evicted at the time when the warranty was made, and not the value at the time of the recovery: and this whether the property to which the warranty is annexed, has become of greater or less value.

As authorities for this position, I will begin with the year books; and as they are not generally in our law libraries, I will give extracts from them with translations—191 H. 6—46.

(Here is inserted the original Norman French.)

(*Translation.*)

“And on the writ he may show that when the land was given, in fee it was only worth 10*l.* a year; and in case the land by being built upon, or by any accidental circumstance relating to it, as where a mine of gold or silver is found, has become at the present time worth 100*l.* a year; and the tenant is impleaded and vouches the feoffor to warranty, and he enters into warranty, he may say that at the time when he made the feoffment, the land was worth no more than 10*l.* a year, and thus far he is ready to enter into the warranty, and this shall be a good plea for him. And so far has recovery been according to our own books in value.

So in such case he shall not be bound to warrant for more than the value when the feoffment was made.

But if he *enters into warranty generally*, he shall render in value according to what the lands are then worth; unless he can bar the demandant's claim."

This authority clearly proves, that, by pleading, the person, who is to be affected by the warranty may, in case the lands have become more valuable than when the warranty was made, that is, when the feoffment or deed was executed, which contains the clause of warranty, show what was the value at the time when the warranty was made, and he shall not be answerable beyond that value.

But if he neglects to do so, and, when he comes in, enters into warranty generally, that is without showing the value when the warranty was made, the recovery, unless he can bar the demandant from any recovery, shall be according to the value of the lands at the time when he *came into court and entered into the warranty*; and for this plain reason, in such case there would be nothing to show that the value, when he *entered into warranty*, was greater than when he *made the warranty*.

The next case I shall cite is 19 H. 6.—61.—The passage I extract is from a long case, and has the authority of Judge Newton; it is as follows:

(Here follows the original.)

(*Translation.*)

"If I alien land with warranty of the value of 40 shillings, and afterwards in consequence of a mine of lead or tin being discovered on the same land, it becomes of the value of 40 pounds a year, if the tenant be impleaded and vouches me, and at the grand cape ad valentiam (a particular process in such cases) I come in, and the demandant cannot be barred from recovery, I may take issue with the tenant what was the *value of the land at the time of the warranty*, and shall not render more in value. Ergo, your case is not law, for mine hath been adjudged."

There is another case 30 Ed. 3. 14.

A writ of ward was brought against Simon Simeon and his wife, who vouched the lady Bardolff.

A great part of the case turns upon the manner in which the pleading should be conducted, but it is determined that, unless for want of proper pleading, the person who is liable under the warranty shall not be answerable for the value of the wardship beyond what it was worth when the warranty was made, although lands had descended in the mean time to the infant, which rendered the wardship at the time of the recovery of much greater value, than it was at the time when the conveyance of the wardship and warranty was made.

The case as reported is as follows :

(Here is inserted the original.)

(*Translation,*)

"In a case where Philippa, queen of England brought a writ of ward against Simon Simeon and Maud his wife, who vouched to warranty the lady Bardolf; during the process against the vouchers, Maud the wife of Simeon died. And afterwards the lady Bardolf came into court, and alleged the death of Maud. But this was not admitted an excuse for her by reason of which she should be excused from entering into the warranty. And if she had entered into the warranty she could not have been received to have said this, because she would have warranted also to a person who was alive.

Wherefore she demanded what they had to bind her (to warranty). Simon produced a deed by which lady Bardolf had granted the wardship to the wife of Simon, that is to Maud, while she was sole, and said he had taken her to wife, by which as it (the wardship) was but a chattel, it was vested in the person of the husband; and so by that deed he would bind the lady.

And the lady demanded judgment whether she was obliged to enter into warranty; and notwithstanding it was the opinion of the court that she should warrant, and inasmuch as she has counterpleaded the warranty in the manner whether she ought to warrant, and had on this demurred in judgment, it was awarded that the queen recover against Simon, and that Simon recover against lady Bardolf; and a writ issued to the sheriff to extend the wardship and the marriage, who returned that they were worth 200*l*. Whereupon

a writ came from the chancery to bring into the chancery the record and process by reason of error, &c.

Wich: Appeared at the bar in behalf of lady Bardolff, and said she had sued against the queen by petition, and prayed that the record might not be sent into chancery. And he further said that though the sheriff had returned the wardship to be worth 200l.—it was at the time when lady Bardolff was seized of the ward and leased to Simon worth no more than 10l.—and that the value now returned by the sheriff is because of lands which have descended to the infant since said lease, and while the infant was in the wardship of Simon, which was an advantage to Simon, but not to lady Bardolff; wherefore he prayed that the reference should be to no other time but that when the wardship passed from the possession of the lady, and that only so much as it was then worth, should be accounted for, and no more.

Stouf: Did the remainder of the land of which you speak descend after the judgment of the recovery in value, or before?

Burt: Whether before or after we consider that the payment can only relate to the value which passed by our deed; for if land shall become more valuable by buildings being erected thereon, or in any other manner, he who recovers in value shall recover only according to that which the land was worth at the time of the conveyance and no more; so here.

Fish: In the case you mention if you enter into warranty simply, without protestation that the land is worth more now than it was formerly, when the alienation was made, you would be bound by the value as it now is, for of any other value neither the court nor the sheriff can have any authority to enquire, unless it is alleged by plea."

I have here translated as much of the case as is particularly pertinent to the question.

Passing from the year books, I find in Brooke's Abridgment, a book of great authority, under the title *Recourvie in Value*, Pl. 59.

That

(Here follows the original French.)

(*Translation.*)

"In a precipe, when the tenant of the land vouches to warranty, when the heir of the feoffee has much increased the value of the land by building upon it, an enquiry shall be made, what was the value of the land at the time of the warranty."

So in Brooke, title Voucher, Plac. 69. it is stated :

(Here follows the original.)

(*Translation.*)

"An assize by Newton. A man makes a feoffment with warranty of lands of the value of 10*l.* a year, and the feoffee improves it by building thereon, or in any other way, so that it becomes worth 40*l.* a year, and he is impleaded and vouches the feoffer : there, if he says at the time of the feoffment the land was worth only 10*l.* a year, and so far he is ready to enter into warranty, this is good and he shall not render in value beyond 10*l.* a year. And otherwise, (that is if he doth not so plead) he would render 40*l.* a year. And in the same year in assize in folio 61 per Newton ;— If a man aliens land with warranty, which is worth 40 shillings a year, and afterwards in consequence of a mine of lead or tin being found thereon, it becomes worth 40*l.* a year, if the tenant is impleaded and vouches me, and at the grand cape ad valentiam, I come in and cannot bar the demandant from recovering, I may take issue with the tenant of what value the land was at the time of the warranty, and I shall not render more in value ; which is not denied."

Descending from Brooke to Rolle's Abridgment, we find under the title Voucher letter T. Plac. 1.

"Home recovers en value selonque le value d'el terre al garantie fait."

"A man shall recover in value according to the value at the time when the warranty was made"—So Plac. 2d.

(Here follows the original.)

(*Translation.*)

"As if land becomes of greater value than it was when the warranty was made, as by the discovery of mines of tin, &c. he shall not be answerable for this increased value, but only for the value at the time when the warranty was made."

Plac. 4. (Here follows the original.)

(*Translation.*)

"If a man grants a ward, which creates a warranty in law, and after the grant other lands descend to him, by which the ward is of much greater value, yet he who granted the ward shall not be answerable according to this increased value, but *only* according to the value at the time when the warranty was created; although the whole ward and right of marriage passed to the grantee at the time when the warranty was first created; and the reason is because the increase in value arises from a descent after the creation of the warranty."

In Viner's Abridgment, title Voucher (Tb.) page 145 in the placita 1. 2. 3. & 4. and the notes thereto, we find the same principles recognized. And in page 147 of same vol. pl. 3. at the top of the page, it is there stated that (supposing the land of the same value at the time he enters into the warranty, as it was when the warranty was made) if the land warranted becomes of greater value after the entry into the warranty, the voucher shall only render in value according to the value at the time when the warranty was made, because he had no opportunity to plead the special matter.

Hence it appears that so clear is the principle, that unless there is default in pleading, the person who is bound by the warranty, shall only be answerable for the value of the land at the time when the warranty was made: that if any thing happens, after he has appeared and entered into warranty, by which the value was increased, he shall not be answerable according to the value at the time of the recovery; but as he had not, at the time, when he appeared and entered into the warranty, an opportunity of showing this increase of value by then pleading it, for the case supposes the increase to have happened afterwards; yet he shall have a right to show what was the value when the warranty was made, and shall only be answerable according to that value.

It will appear clearly that, with regard to the value to be recovered, the authorities make a distinction between the value of the thing when the warranty was made, and the value when the warranty was entered into, and in my argument I have uniformly

stated, that the time when the *warranty is entered into* is the time when the *vouchee comes into court, and offers to warrant the land* ; and I refer to Booth's Real actions 46, plac. 9, to prove me right, should it be doubted.

Before I leave the subject of warranty and its consequences, it may not be amiss to suggest, that in case of partitions by coparceners, tenants in common or joint tenants, and in exchange of property,—the effect of that condition in law, or warranty arising from these transactions, is very different from the warranty in case of lands, &c. belonging to one person and *sold* for money to another. †

Coparceners, tenants in common, and joint tenants are all equally interested as *owners* of the property to be divided. If then upon a division made, the part allotted by one is recovered by an elder title, it shows that it was no part of the property to which they had *mutually a right* ; and therefore as the *residue* of the property only was that to which they were equally entitled, a new partition shall be made of such residue of property, as if no division had been made.

So also in case of dower, the widow is entitled to the one third of the lands belonging to her husband in fee simple or fee tail ;—if she is endowed of certain lands which are recovered from her by an elder title, this proves they were no part of the lands to which her husband was entitled at the time of his death, and that it is *only in the residue* she was entitled, and *of that residue* she shall be endowed in the *same manner* as if the *first endowment* had never been made.

Co. Lit. 173b. 174a. Noy's Maxims 61. 4 Coke 122, 123.

In the case of Exchange, one tract of land belonging to the one, is given or exchanged for another tract of land which belonged to the other ; (it makes no difference whether land is exchanged for land or for other real inheritance).

In this case, suppose the two persons to be A. and B ; if the whole or any part of the land received by A. in exchange from B. be recovered from him by elder title ; A. has a right to enter upon and take possession of the whole lands which B. received from him in exchange, in which case the exchange is defeated,

and B. has a right to any land from which A. was not evicted. Co. Lit. 173b. 174a. 4 Co. 122.—Cro. Eliz. 902. pl. 6.—Cro. Eliz. 917. pl. 9.—More 665. pl. 909.—Noy's Maxims 61.

The great principle, upon which this doctrine relative to exchanges is founded, is, that as A. *possessed* a certain tract of land which he exchanged with B. for another, he has a right again, upon being evicted, to resort to and possess himself of the same specific property, which he had given to B. for the property recovered; and that specific property is all he can claim, even though it had become less in value, than when the exchange was made; and even though the property which he had received from B. in exchange and which was evicted, had become much more valuable since the exchange made.

And this is perfectly agreeable to the doctrine for which we contend, for Thomas and Joseph Williams sold to Sumner and wife the equity of redemption in these lands *for a sum of money*, and the lands have been recovered by an elder title, and we contend the purchaser is to have the property he gave for these lands, that is to say *the sum of money given in exchange* or payment for them; and this without any regard to the circumstance, whether the lands are worth now more or less, than at the time of the sale; or whether money is now more or less valuable than it was at that time.

An additional argument may be drawn, by analogy, from the case of insurance;—and warranties of land may be truly called cases of insurance, for they are insurances of real property, as to title.

If a merchant insure merchandize coming from the East Indies to a port in America, and the same is lost even within sight of the port of delivery; yet the insurer shall only pay the invoice price as purchased in India, although from the state of the market, the merchandize would have sold for ten times the price, had it arrived safe in port.

Park's Insurance 98.

Nay, it appears to me, to establish the principle, that he who sells lands should be answerable not merely for the sum he received, but for the value of the thing sold at the time when recovered,

would prevent any person from ever warranting the land sold. Many circumstances may occur which in a few years shall give the property a real or nominal value, to the amount of ten times the sum, which was given for it ; and which should not be in consequence of one cent expended by the purchaser. A city may be laid out ;—for instance the city of Washington, which increased landed property more than one hundred times its former value.

The erecting of public buildings, or other improvements in a particular part of a city might increase property in the vicinity ten fold ; so might the rapid change of improvement in a particular part of a city ; so even in the country the change of a public road, the laying out of a turnpike, the opening the navigation of a river, might double the value of landed property in the vicinity. Was this increase of value to be the rule by which the compensation is to be made, no person would be safe, no person who sells lands could know the extent of his obligation ; and two persons might sell lands the same day, of the then same value, and for the same price ; and in twelve months the one, in case of eviction of the lands, might have to pay ten times as much as the other.

As well might Mrs. Sumner, had Sumner and wife lent the same sum of money to Thomas and Joseph Williams and had now sued for it, contend, that instead of paying principal and interest they should pay a sum equal to the present value of these or any other lands, because with the money so lent such lands might have been bought.

And here let us take the reverse of the question. Had we received from Sumner and wife for these lands, say, 1000*l.* and before the eviction, they had become not worth more than 50*l.* would the purchaser be satisfied with only recovering from us the 50*l.* and leaving us in possession of 950*l.* clear profit ? I think the one position tests the other, Vide Ersk. Inst. 4 John. 8. and shows that on an eviction, the money which was actually paid, is the only sum which ought to be recovered back, or at most with interest thereon.

I have endeavoured to show that Thomas and Joseph Williams were only answerable in their character as administrators and not personally ; that any engagement into which they entered did not

amount to a warranty according to the technical sense of that expression ; and if it did, to prove the recovery ought only to be according to the value when the property was sold, or what is the same thing the purchase money given by Sumner and wife for the equity of redemption, for it is relative to that deed that I am now treating.

But it may be said that although that deed does not convey an interest to which a warranty may be annexed, yet the words used in the deed way amount to a covenant upon which a *personal* action may be brought, and for the breach of which damages may be recovered.

I admit that the words used in the deed will amount to such covenant, and if there has been a breach, that a suit may be supported ; but every argument that has been used to show that they are only answerable as administrators opposes the claim against them in their private or personal characters, and every authority or reason, which can be adduced to show that when the remedy is by voucher or warrantia chartæ, the compensation is to the value of the thing sold at the time of the sale, is equally powerful to show that on the personal action of covenant, the damages ought also to be regulated thereby ; as this action is merely a substitute for those remedies, and adopted where those cannot be used in order to obtain for the plaintiff compensation for the same injury, for which he is to be compensated by the other remedies where they can be used.

There is one other point of view in which the covenant may be considered.

There are these words " and we in our *capacity of administrators* do covenant with the said Increase and Elizabeth their heirs and assigns, that we *administrators* as aforesaid are lawfully seized of the premises, that they are free and clear from all incumbrances by us or with our knowledge made."

It may be said that this is a joint covenant, it may also be said that if there was knowledge of incumbrances before this deed such incumbrances will be considered as incumbrances with their knowledge. To this the only answers which perhaps can be given, are, in the first place, that incumbrances, though made, if

made without the knowledge or privity of Thomas and Joseph when they were made, do not come within the covenant ; in the next place, that as the covenant is joint, as will be contended, *so must the knowledge be joint upon which she can recover ;* and therefore, the knowledge of Thomas even if that can be established, cannot affect Joseph in an action of covenant, unless they can show Joseph also knew of the defect in title.

It is stated in a letter from Mr. Sullivan that Thomas Williams knew of the defect in title when he executed the deeds to Sumner and wife. What will be the proofs of this I know not. There can be no doubt but that in the year 1786, when he took the mortgage he must have supposed Dudley to have been seized in fee, otherwise he would have taken his security upon other property, which I am informed Dudley held in fee simple ; or he would have insisted that Dudley should suffer a common recovery of these lands before he mortgaged them. Therefore, if Thomas Williams knew of this defect when he conveyed, he must have obtained the knowledge between the 6th day of July 1786, and the 11th May 1789, when he made the conveyance.

But the important question upon this subject is, how far the knowledge of Thomas shall affect Joseph.

Even though Thomas did know of the defect in the title, there cannot be the least suspicion that Joseph knew it. Their situations were as different as possible. As Thomas held no other security for his debt, but the property in dispute,—it might be very natural for him to sell the mortgaged property to obtain the money due to him and take the chance that the defect of the title would not be discovered ; the same principle would cause him to join with Joseph in selling the equity of redemption, nay to urge him so to do, as that would be an act the tendency of which would be to support his claim under the mortgage.

There can be no possible reason to suppose Thomas communicated to Joseph the defect of title. Joseph had *no interest* in selling the land, he was to have no benefit to himself, he was guardian, also, I am informed, to the youth, who has recovered from Mrs. Sumner. If therefore he had possessed any knowledge of the defect of title, his own interest, and the duty he owed his

ward, would equally have prevented him from having joined in the conveyance of property.

If Sumner knew of the defect of title when he purchased, it would be totally immaterial whether Thomas or Joseph knew it or not; and because Thomas knew it, there is no more reason to suppose Joseph knew it, than to suppose Sumner knew it; especially when we consider it was the interest of Thomas to conceal from Joseph the defect of title, and was equally the interest and duty of Joseph as to himself and ward not to have executed the conveyance, if he had been informed antecedently of the defect of title.

Here I will again suggest that if the claim of Mrs. Sumner is grounded upon the principle that the parties who sold knew the title was defective; her remedy is by bill in Chancery, or an action had and received to her use; where, as I have before stated, nothing can be recovered but the money paid, at most with interest. And as to Mr. Joseph Williams I will also observe that fraud is never to be presumed, and therefore even should it be proved that Thomas knew the defect in title, from thence no presumption ought to be raised, that Joseph also knew the same.

Before I conclude I will state certain decisions, which have taken place in the state of Maryland in cases similar.

A gentleman, who had purchased lands from the state of Maryland, was evicted; he applied to the legislature for compensation. His petition was referred to a committee who consulted able counsel on the subject, and the compensation made was by ordering the Treasurer to pay the original purchase money with interest.

Since the American Revolution, in the State of Maryland several families of people of colour who were held as slaves, have obtained freedom, in consequence of proving that they were descended from a free white woman. I suppose that the individuals thus freed amount to more than a thousand. Many of these were in the hands of purchasers, who in consequence brought suits against those from whom they had purchased. I have been concerned as an attorney, sometimes for the plaintiffs and sometimes for the defendants, and I believe in no instance has damages been given beyond the original purchase money with interest, without

any regard to the situation of the slave when freed ; I mean whether the slave was then worth more or less, than when purchased. Nor has interest always been given.

P. S. In addition to the authorities before cited to show that the plaintiff's damages ought only to be commensurate with the value of the property at the time of the conveyance, by which the warranty or the covenants are created, I will refer to Godbolt 151, Ballet *vs.* Ballet (case 197) ; the sixth point which was agreed to by the judges.

I will also refer to 2d Bacon's Abrid. Gyllim's Edit. page 368, where it is stated that " If the husband makes a feoffment in fee of lands, and the feoffee builds thereon, and improves the same greatly in value ; yet the wife of the feoffor shall have dower only according to the value of which it was in the husbands time ; *for if such feoffment were with warranty, the heir would be bound to render only the value as it was at the time of the feoffment.*"

That where a conveyance has actually been executed and the money actually paid, the purchase money cannot be recovered, though the purchaser is evicted, in an action on the case, unless fraud or deception can be proved ; the case of Gates & al. *vs.* Winstow, Mass. Term Rep. p. 65, is an authority in addition to those before cited.

(Signed)

LUTHER MARTIN.

Baltimore, 12 Sept. 1806.

LEGAL BIBLIOGRAPHY

ARTICLE 1. LIBRO DEL CONSULADO.*

Collection of the maritime usages of Barcelona, hitherto commonly called The Book of the Consulate, newly translated into Castilian, with the Limousin text restored to its original integrity and purity; and illustrated with various appendices, glossaries, and historical observations. By Don Antonio de Capmany, and de Monpalan, permanent Secretary of the Royal Academy of History. Published by the appointment and at the expense of the Royal Council and Consulate of Commerce of the same city, under the direction of the General and Supreme Council of Commerce of the Realm. Madrid: printed by Don Antonio de Sancho, 1791. 2 vols. 4to. pp. 268. and 236.

The above is the translation of the title page of a work, handsomely printed at Madrid, in the year 1791.† The first volume contains a preliminary discourse by the Editor; a table of the chapters, numbered as in the former Spanish editions, but arranged under titles, into which the work is now, for the first time divided; the Consulate itself, in the old Limousin or Catalanian and modern Castilian, in corresponding columns, arranged under separate heads; a Castilian glossary of the naval and mer-

* Consulado. Tribunal in negotiatorum causis jus dicens. Dict. of the Royal Acad. of Spain.

† A copy of this edition, which the editor recently had an opportunity of inspecting through the politeness of the Librarian of the Am. Philos. Soc. was presented to that institution by the late Spanish Ambassador. It is perhaps, the only copy in this country, except one owned by P. S. Du Ponceau, Esq. of Philadelphia.

cantile words used in the translation; a vocabulary of the more difficult Catalonian words; and some examples of the errors of two former Castilian translations.

The second volume, which is an appendix to the first, contains a Castilian version of the supposed Rhodian Laws, from the text published by Leunclævius, in his *Jus Græco-Romanum*; a collection of ancient laws and ordinances of Spain, relating to naval commerce, and the conduct of merchants and mariners; and a catalogue of authors of different nations, who have written on mercantile jurisprudence and maritime legislation.

The Book of the Consulate of the Sea, is considered to be the most ancient, and certainly was the most generally received body of written customs relating to the maritime commerce of modern Europe, now extant. The earliest printed copies commonly known are in the Italian language, and the collection itself has sometimes been supposed to be an Italian work, and been attributed to the Pisans. The present editor, in a very learned preface, vindicates the claim of his own country to the honour of its compilation.

Cleirac, in his preface to the *Us et coutumes de la Mer*, Rouen, 1571, p. 2, says, that Queen Eleanor first drew up the *Rôle d'Oleron* in that island, on her return from a crusade, at a time when the customs of the Eastern Sea, inserted in the Book of the Consulate, were in vogue and credit through all the east. Grotius, *De jure B. et P. lib. iii. ch. 5. sect. 10. n. 6*, says, 'there is published in Italian, a book called the Consulate of the Sea, in which are found the ordinances on this subject (the text relates to assistance given by neutrals to enemies) made by the Greek Emperors, the Emperors of Germany, the Kings of France, Cyprus, Majorca, and Minorca, and the Republics of Venice and Genoa. Emerigon; in the preface to his *Traité des Assurances*, p. 6; cites Grotius, as saying, that the Consulate itself is a collection of Ordinances of these emperors, kings, &c. and adds, that he is followed in this this subject by *Marquardus*, chap. v. sect. 39. Emerigon adds also on the authority of Targa, ch. xvi. p. 395, that this collection was composed by the order of the Kings of Arragon, and became the rule, to which almost all the Christian nations, addicted to maritime commerce, voluntarily submitted: and then states it to have

been adopted at Rome, in 1075 ; at Acre, in 1111 ; at Majorca, in 1112 ; at Pisa, in 1118 ; at Marseilles, in 1162 ; at Almeria, in 1174 ; at Genoa, in 1186 ; at Rhodes, in 1190 ; in the Morea, in 1200 ; at Venice, in 1215 ; in Germany, in 1224 ; at Messina, in 1225 ; at Paris, in 1250 ; at Constantinople, in 1262, &c *Emerigon* appears to have taken these dates from the catalogue, that is found in the several former editions.

The present Editor has pointed out several errors and anachronisms in the catalogue, but supposes it to have been founded on tradition, and to evince, at least the antiquity and general adoption of the code. Indeed, most of the older foreign jurists, mention both its antiquity and its prevalence.

It seems probable that Grotius may have been misled by this catalogue, to speak of the code as containing the Ordinances of Emperors, &c. But, as is observed by the present editor, the code itself (exclusive of the first 44 chapters) bears no mark of royal or legislative authority ; and, on the contrary appears by several passages, to be a compilation by private persons, merchants and mariners. Thus, the 44th or 45th chap. which is properly an introduction to the collection of customs, begins thus : " These are the good rules and the good customs concerning maritime affairs, which the experienced men who navigated the world, began to give to our forefathers." In another chapter we have this expression, " For this reason, the good men who formed these statutes and customs, saw and knew." In other parts, the compilation is spoken of as " The written customs of the sea."—In other parts, these expressions occur : " Our forefathers who first sailed about the world." " Our predecessors." " Our ancient predecessors." " The good men of former times," " Said and declared," " found it right to correct, amend, or explain," " consulted together how to remove the doubts."

The editor states the first forty-two chapters, which relate to the establishment and authority of consuls, to be the ordinances confirmed by Don Pedro the Third, to the city of Valencia, after the establishment of a consulate there in 1283 : these, he says, were adopted at Majorca for the government of the new consulate, established there by Don Pedro the Fourth, of Arragon, in 1348 ;

and a copy of them transmitted to Barcelona, at the erection of a similar jurisdiction there by the same king, in 1347. This copy he professes to have seen and examined; and very naturally concludes, that these chapters found their way thence into the Barcelona edition of 1502, from which the subsequent editions and translations have been derived. Of these forty-two chapters, the first seven are omitted in the present edition, as being merely local, and relating to the appointing of Consuls at Valencia. The ordinances of Don Pedro the Third, are evidently posterior to some collection of written customs; for the Consuls are directed to give their judgments according to the written customs of the sea.—The 43d chapter is also rejected, as being an ordinance of James the First, of Arragon, relative to the oath to be taken by advocates, and unconnected with this compilation; and the 44th, as relating only to a particular measure of the quintal in the importation of spices, &c. from Alexandria. At the close of the preliminary discourse, the editor gives a very particular account of the old printed copy of this code, in the Catalonian dialect, which had been at that instant communicated to him, in which these constitutions of Don Pedro, of Arragon, are not found.* This copy, he says, is without date, or printer's name; but from the type, paper, and other internal evidence, he supposes it to have been printed about the year 1480; and, consequently the earliest printed copy. It is remarkable that the editor, who appears to be a person of much learning, makes no mention of the Amalphitan Table of Sea Laws, which has been supposed to be prior in date to the present, and to have been, in fact, its parent; but I am not aware that any copy of this is extant, or that any writer professes to have read or even seen it. This Amalphitan table is supposed to have been compiled about the close of the 11th century. The present code, or at least its name, must be of a subsequent date, as the first establishment of a commercial tribunal of this name, was by Roger the First, of Sicily, at Messina, in 1128. It may be proper to observe, that most of the Continental nations have a Tribunal of Commerce,

* This must be the edition of *Celleles*, 1494, the oldest extant. It has lately been translated into French by M. Boucher, Professor of Commercial and Maritime Law in France.

whose judges are called Consuls, established in most of their principal towns.

The Editor's opinion is, that the code in its present form is not older than the 13th century, and that it was drawn up at Barcelona, in the reign of James I. of Arragon; and among other reasons for his opinion, he takes notice of its being in the common language of the country (*en romance*), which at that time began to be used in written compositions; of the mention of paper, which was not in use before the 13th century; and of millareses, a coin of Montpellier, which was under the sovereignty of this James. Some authors have ascribed it to the time of St. Lewis, which nearly corresponds with this date.

The Catalonian or Limoisin dialect must have been intelligible in many places, as it was derived from Limoges, and was the common language of the inhabitants, not only of Catalonia, but also of Valencia, Majorca, Minorca, Ivica, Sardinia, Guienne, Provence, and all Erancia Gotica†; and bears a great resemblance to the old French of other provinces. This compilation is very verbose in its language, and abounds with repetitions, and has much more of the Spanish than the French air.

The first printed edition generally known, was published at Barcelona, in the Catalonian dialect, in 1502. There have been two Castilian versions before the present, one by Francisco Diaz Roman, in 1539, and the other by Don Cayetana Palleja, in 1732.—There is also extant a French translation by F. Maysobi, in 1576, and a Dutch version by Abraham Westerween, which does not seem to have been known to the Spanish. An English translation of the 273d and 278th chapters, which are on the subject of hostile capture, was published in 1800, by Dr. Robinson, to whom the publick is indebted for Reports of the Proceedings in the Court of Admiralty. It is to be regretted that Emerigon, who was every way qualified for the task, did not fulfil his intention of publishing a new French translation with notes.

I subjoin a list of such printed editions as I have any where found mentioned:—

* Gaspar Escolano, lib. i. de la Historia de Valencia, cap. 14. quoted in the preface to the Amsterdam edition of the Consulate.

Catalonia—supposed about 1480; no place, date or printer's name, known. [This must be the edition of 1494, by *Celleles*, as before surmised.]

Catalonian—1502, at Barcelona.

Castilian—1539, by Francisco Diaz Roman.

Italian—1544, at Venice, by N. Pedrozano. [This edition in 4to was reprinted in 1576, by Dan. Zaneti and others: and again in 1584. Westerwenius says, it has *a superfluity of words*.]

Italian—1576. Ibid. by Gabriel Zeberti. [Query 1567. Schomberg on the Maritime Law of Rhodes, p. 86.]

French—1576, at Marseilles, by Giraud, translated by F. Maysoni. [Query 1577. Stigmatized by Emerigon and Boucher, as a bad translation.]

Italian—1579, at Venice.

Catalonian—1492, at Barcelona.

Italian—1599, at Venice.

French—1635, at Aix, by Stephen David. Maysoni's translation.

Italian—1696, in the *Discursus legales de Commercio of Casa-regis*.

Italian and Dutch—1723. [Query 1704.] at Amsterdam, by S. Schouten. Westerwenius' translation (from the Italian.)

Castilian—1732, at Barcelona, translated by Don Cayetano de Palreja [Baille-de-la-Ville.]

Castilian—1791, the present edition.

This article may very properly be closed with an account of the late French translation, translated from a Paris Journal by the editors of the Boston Anthology:

Consulat de la mer, or Pandects of commercial and maritime Law, being the law of Spain, Italy, Marseilles, and England, and consulted by all nations as written reason, according to the original edition of Barcelona, of the year 1494; dedicated to Mons. Regnier, Prince Cambacérés, Arch-Chancellor of the Empire. By P. B. Boucher, professor of Commercial and Maritime Law, in the Academy of Legislation, etc. 2 large volumes in 8vo. p. 1400.

If Spain was indebted to the prowess of the Moors for that fame which she was unable to preserve after their expulsion, still some

cities which passed from her dominion into the power of the French, appear to have gained by the exchange. Thus, Barcelona, after having been wrested from her by the victorious arms of Charlemagne, soon acquired a most extensive commerce. She even reached, under the auspices of that powerful monarch, such a degree of consequence, that she became the common mart of nations, and the arbiter of commercial and maritime transactions.— Then appeared in that capital, the celebrated compilation of marine laws, known originally by the name of *The Laws of Barcelona*, and afterwards under the title of *Il Consolato del Mare*. This, which was then the only system on the subject, was considered as law by the merchants and navigators of all nations.

Towards the end of the 15th century, the Laws of Barcelona were considerably altered and corrupted. At this period, Francis Celelles, a Catalonian, *through charity alone*, as he himself asserts, *with much labour, frequent conferences, and advice with skilful and aged persons, and recurrence to many authorities*, undertook to restore the *Consolato del Mare*, to its ancient purity. His work, written in *Catalun*, was printed for the first time, at Barcelona, in 1494. The edition was almost immediately exhausted, and at last became so rare, that there were doubts of its existence. In the mean time, many fragments of the *Consolato* became known to foreigners, who adopted them, and among the rest, the English, although they were the first to violate it.

What must have been the surprise and joy of the *jurisconsult* Boucher, when in his researches into the antiquities of commercial and maritime law, he met with an original copy of the *Consolato del Mare*, of 1494! His first step was to restore to his country this valuable code of maritime laws, which the French may, in reality, claim as their own, having established, or at least revived them under their government.

It is in fact, the *Consolato del Mare*, purified by Celelles, that M. Boucher has translated from the Catalan into French, and of which he has just given an impression. We cannot convey a more exalted idea of this work, than in announcing it as the only long known marine code, of which the first digest was made by the French Catalonians, and as having furnished the basis of our pre-

sent commercial and maritime jurisprudence : being ever an authority in all cases not provided for by our laws.

The edition of Celelles is divided into three parts, of which the intermediate one, by far the best, comprehends the *Consolato*, properly so called, which treats of the usages and customs of the sea ; the part which precedes and that which follows, contain some ordinances of the kings of Arragon, that Celelles acknowledges he added of his own head. M. Boucher, who has confined himself to rendering his original with minute exactness, has not in the least degree varied from this division.

As to the style of this translation, M. Boucher, considering with as much propriety as taste, that it would have been highly improper to give a modern gloss to a gothick composition, and willing even to respect the defects of this venerable pile, has preserved the Catalan construction, as far as it was possible, deviating from it only where it cast too great an obscurity upon the subject. We cannot forbear expressing our gratification at his talent of preserving to his text the stamp of the age in which it was written, characterised by those natural expressions, and that attractive simplicity which we find with such pleasure in ancient writers.

As M. Boucher wished to establish several positions relative to the time and place, in which the *Consolato* was first digested, and to the grounds of the decisions contained in it : and also to explain several points there decided, and to notice some apparent omissions, he found it necessary to add an entire volume of dissertations, in which this learned man has displayed much erudition.—

The second volume presents us with a pure and plain text, containing rules of conduct for the lawyer, the magistrate and the merchant, while the first offers to the man of letters a varied and instructive entertainment. Among other subjects, he will there see with pleasure and interest, the researches into the Catalan dialect, which the author proves not to be, as has been supposed, the *Limousin* altered, but that they are different dialects, both derived from the Latin, corrupted by the Teutonic. Then follow the chapters upon the code of Justinian, the compilation called the *Rhodian Laws de jactu*, and the regulations and ordinances of Wisbuy ; in which it is shown, that the Rhodian Laws, whose origin is lost

in the remotest antiquity, the ancient customs of the east, and the laws of Justinian, formed the basis of the *Consolato*, which in its turn became the foundation of the laws of Oleron, and of the ordinances of Wisbuy; articles upon Spain, the Moors, the maritime cities of Italy, the Eastern and Asiatick countries; details relating to the Isle of Rhodes and its ancient power, in which mention is made of the famous colossus, as well as of the obelisks brought from Egypt to Rome, and of the construction and dimension of the vessels used for their transportation; dissertations on the Chinese, the mariner's compass, the usage of flags, the origin of different marine officers, upon punishments and executions; upon the state of navigation in the middle ages, pilgrimages, coins, weights and measures. We have then something upon feudal anarchy, and many of its institutions, and a concluding chapter upon the origin of bills of exchange, in which we perceive, against the received opinion, that the Jews are not the inventors of them; but that they take their rise from the highest period of antiquity in India, besides having been used under different forms, from time immemorial.

It would be tedious even to mention here the great number of other subjects which the translator of the *Consolato* has laboured to collect; and which he has thought necessary to the elucidation of his text. We will not conceal our belief that this part of the work might have been greatly compressed. The author leaves his subject very frequently; he cites to little advantage ancient verses, songs, old histories; and all this to embellish an ancient *maritime code*! But the second volume makes amends for the rambling and extravagance that is found in the first.

A translation of the *Consolato* by the Editor of the Law Journal, was announced some time ago: But, in the present situation of affairs, it is impossible to make any promise respecting the appearance of the work.—*Inter arma silent leges.*

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Court of Errors.

Livingston and Fulton, v. Van Ingen, et al.

YATES, J.—This is an appeal from an order of the court of chancery, refusing to grant an injunction.

The appellants claim an exclusive right to navigate the waters of this state, by steam, for a limited time, grounded upon several statutes of this state, by which this right is granted and intended to be protected and secured to them.

The respondents contend that the laws are void, being repugnant to the laws and constitution of the United States, and therefore gave no right to the appellants upon which the relief, or injunction sought by their bill, could be founded : two questions consequently arise.

1st. As to the constitutionality of the laws.

2d. Admitting their validity, whether the appellants are entitled to enjoin the respondents, according to the prayer of their bill, or to any other remedy than that prescribed by the legislature.

The importance of this decision must be evident to every one who hears me ; no question has, perhaps, ever presented itself

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to this court of greater magnitude, involving principles so highly interesting to the community. In making up my opinion, therefore, I have endeavored to bestow the strictest attention to bring my mind to a satisfactory and correct conclusion on the subject.

The first law, passed in March, 1798, recited—That whereas it had been suggested to the people of this state, represented in senate and assembly, that *Robert R. Livingston was the possessor of a mode of applying the steam engine to propel a boat on new and advantageous principles*, but that he was deterred from carrying the same into effect, by the existence of a law granting and securing to John Fitch the sole right of making and employing the steam boat by him invented—That Fitch was either dead, or had withdrawn himself from the state, without having made any attempt, in the space of more than ten years, to execute the plan for which he obtained the exclusive privilege, whereby the same was justly forfeited; and by this act privileges similar to those before granted to Fitch were granted to Mr. Livingston for twenty years, on his satisfying the governor, lieutenant-governor, and the surveyor-general of this state, of his having built a boat, of at least twenty tons capacity, which should be propelled by steam, and the mean of whose progress through the water, with and against the ordinary current of Hudson river, taken together, should not be less than seven miles an hour; and that he should at no time omit, for the space of one year, to have a boat of such construction plying between the cities of New-York and Albany. The same privilege was granted in April, 1803, to Messrs. Livingston and Fulton, the present appellants. In 1807 the act was extended for two years, within which time it was not contended but that the provisions in the first act were complied with, the boat being built, and the experiment proving successful. In April, 1808, an act passed for the further encouragement of steam boats in the waters of this state, and for other purposes. This law enacted, that whenever Robert R. Livingston and Robert Fulton, and such persons as they might associate with them, should establish one or more steam boats, or vessels other than that already established, they should, for each and every such additional boat, be entitled to five years prolongation of their grant or contract with this state;

provided nevertheless, that the whole term of their exclusive privileges should not exceed thirty years after the passing of that act: That no person or persons, without the license of the persons entitled to the exclusive right to navigate the waters of this state by boats moved by steam or fire, or those holding the major part of the interest of such privilege, should ~~be~~ in motion, or navigate upon the waters of this state, or within the jurisdiction thereof, any boat or vessel moved by steam or fire; and the said person or persons, so navigating with boats or vessels moved by steam or fire, in contravention of the exclusive right of the appellants, and their associates and legal representatives, should forfeit *such boat or boats and vessels, together with the engines, tackle and apparel thereof, to the said appellants and their associates.*

After the most minute examination of those statutes, I cannot find that Mr. Livingston, originally, nor Mr. Fulton, subsequently, pretended to be the inventors of this steam boat; on the contrary, by the recital in the law of 1798, Livingston represents himself to be the possessor of a mode of applying the steam engine to propel a boat on new and advantageous principles.

This power of granting exclusive privileges must necessarily exist somewhere, as the legitimate source from whence the encouragement and extension of useful improvements is derived, and from its nature is generally exercised by the sovereign authority of every civilized country; and in no government can it be placed in safer hands to insure those important advantages than in our own, where the sovereignty is in the representatives of the people. Before the adoption of the constitution of the United States, every state in the union unquestionably possessed the uncontrolled exercise of this power within its own territory, and most of them exercised it, as will appear on an examination of the laws passed by the legislatures of some of the states; several of those have been stated to this court. This, however, is so plain and evident a proposition, that a recurrence to those laws cannot be necessary to establish it.

The laws granting and securing this exclusive right, it is contended, are unconstitutional—

1st. Because they interfere with the power of congress to regulate patents.

2d. Because they interfere with the regulation of commerce.

I do not think it necessary on this occasion to enter generally into the discussion of powers granted to congress, and which are to be considered as exclusive, or which ought to be deemed concurrent. It cannot now be questioned, particularly since the amendments to the constitution of the United States were adopted, that according to the 10th article of those amendments, "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." By the 8th section of the constitution, among the powers granted to congress, it is stated, that they shall have power "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries." Thus it appears in the exercise of this power, they are limited to authors and inventors only; this clause, therefore, never can admit of so extensive a construction as to prohibit the respective states from exercising the power of securing to persons introducing useful inventions, (without being the authors or inventors) the exclusive benefit of such invention for a limited time: a power no less instrumental in promoting the progress of science and the useful arts, and consequently equally essential to the prosperity of the country. The beneficial effects experienced by other countries, particularly England, sufficiently show the policy and propriety of passing laws for the encouragement of imported inventions. This power, then, evidently necessary and useful, is not granted to congress by the clause as to authors and inventors, and is not taken away by some other part of the constitution, it must, of course, be retained by the respective states, to be exercised by them until it interferes with the laws of the United States, passed to secure the author or inventor. It is not probable that such collision will take place; whenever it does occur, it remains exclusively with the courts of the United States to interpose; and no doubt can be entertained but that the person claiming a right by patent, as inventor, would prevail, and the state law would give way to the superior power of congress.

The laws granting this exclusive privilege to the appellants cannot interfere with the regulation of commerce: It never

could have been intended that the navigable waters within the territory of the respective states should not be subject to their municipal regulations. It might with equal propriety be applied to turnpike roads, ferries, bridges and various other local objects, and thus, in the vortex of this construction, almost all subjects of legislation would be comprehended, and might eventually lead to the total prostration of internal improvements.

All municipal regulations, therefore, in relation to the navigable waters of the state (according to the true construction of the constitution,) to which the citizens of this state are subject, the citizens of other states (when within the state territory,) are equally subjected; and until a discrimination is made, no constitutional barrier does exist. The constitution of the United States intends that the same immunities and privileges shall be extended to all the citizens equally, for the wise purpose of preventing local jealousies, which discriminations (always deemed odious) might otherwise produce. This constitution, then, according to my view, not preventing the operation of those laws granting the exclusive privilege to the appellants, they are entitled to the full benefit of them.

By the law of 1808, the boats, together with the engine, tackle and apparel thereof, are forfeited to them; and a question is raised here, whether the appellants are entitled to any other remedy than that prescribed by the legislature.

This right being claimed under an express grant by the statute creating the forfeiture, and no doubt remaining of the existence of the boats, the presumption was irresistible that they navigated contrary to the statute, and that the property was in the appellants. The injunction, therefore, on those grounds, might well have been ordered. I cannot discover what injury could arise by preventing such acts as might create the forfeiture afterwards: it could only operate as a prohibition in navigating contrary to the statute.

Most of the cases cited by the respondents, where injunctions had been refused in the first instance, are cases on *prerogative*, or where the right was doubtful, and the granting of the injunction might create irreparable mischief. I do not think they can apply to this case.

In the case of *Gyles v. Wilcan, Barrow and Nutt*, 2d Atk. 141, a bill was brought for an injunction to stay the printing of a book, and the question was, whether it had been borrowed from another book, contrary to the statute of Ann, also creating a forfeiture. Lord Hardwicke said it was not a case proper for law, as it would be absurd for a judge to sit and hear both books read over, which was necessary, where one is only a copy; and that the court was not under an indispensable obligation to send all facts to a jury, and continued the injunction until arbitrators had awarded as to the fact. If this be so, might not the propriety of refusing this injunction to try a fact at law of such public notoriety, as to their navigating or not, be questioned? There is scarcely a citizen not cognizant to the fact. And ought this injury, then, to be permitted in the present case, by an inflexible adherence to what is not deemed indispensable in the case just cited? I should think not.

In the case of *Blackwell v. Harper*, 2d Atk. 92, the remedy was by injunction—and where the right is matter of record injunctions are granted. 1st Vesey, 476. So in 3d Vesey, 140, an injunction granted, that the validity of a patent might be tried at law; and in 14 Vesey, 130, *Harmer v. Plane*, injunction granted where right is doubtful—party being in possession. 6 Vesey, 707, is to the same point, also 1 Brown, 451.

From these and numerous other cases, no doubt can exist that the injunction in this instance ought to have issued. My opinion, therefore, is, that the order of his honor the chancellor be reversed, and that the cause be sent back with directions to enjoin the respondents.

THOMPSON, J. In examining the questions which have been presented in this case, I shall pursue the order adopted on the argument. By first inquiring into the right claimed by the appellants; and secondly, whether, if the right be established in them, they are entitled to an injunction to restrain the respondents from an infringement of that right.

In considering the first branch of this subject, I deem it unnecessary to go into a particular inquiry as to the constitutional power and authority of the legislature to grant exclusive privileges upon the *navigable waters* within this state. All objec-

tions heretofore raised against the laws in question on this ground, have been in a great measure abandoned by the respondents' counsel. I would observe, however, generally, that viewing this state as an independant sovereignty, not having surrendered any of its constitutional powers to the government of the United States, I am at a loss to discover any reasons why this power should be denied to the legislature. There is certainly no express prohibition in our constitution ; nor do I see any reasons growing out of the nature and principles of our government, for denying to it this act of sovereignty. It appears to me a necessary and indispensable power, which, under a wise and discreet exercise of it, will be productive of very beneficial effects. The power of granting exclusive privileges upon land, has not been, in the least degree, questioned ; and the same reasons, both of principle and policy, will allow to the government the exercise of analogous powers upon the waters within the jurisdiction of the state. No distinction appears to have been recognized in the practice of our government. Grants of land under the water, the exclusive right of ferriage and the regulation of the fisheries in the Hudson river, as well as canals, turnpike roads, and exclusive privileges of running stage-wagons, have all been occasionally subjects of legislative bounty and provision.

All the arguments which have been urged against the policy or expediency of granting exclusive privileges in general, or the particular privilege, which forms the present subject of inquiry, have been addressed to the wrong forum. These were arguments for legislative and not for judicial consideration. We are called upon to pronounce what the law is, and not what it ought to be. In a legislative capacity, considerations of policy and expediency are entitled to their due weight, to convince the judgment or guide the discretion. But in a judicial capacity, no such latitudinary power is given ; we are under the solemnity of an oath to decide the rights and claims of parties, according to existing law. Unless, therefore, we are prepared to pronounce the laws under which the appellants' claim is set up, absolutely void, their right must be considered as fixed and established. I shall not stop to examine whether it be competent for the courts of justice in this state to disregard acts of the legislature, and

declare them unconstitutional and void. The counsel for the appellants have not put their cause upon this ground. But admitting such power in the judiciary, it ought to be exercised with great caution and circumspection, and in extreme cases only. It certainly affords a strong and powerful argument in favour of the constitutionality of a law, that it has passed not only that branch of the legislature, which constitutes the greater portion of our court of dernier resort, but also the council of revision, which is composed of the governor and the two highest judicial tribunals of the state, (next to this court,) and whose particular province it is to examine and make all constitutional objections to bills, before they become laws. And if this affords ground of argument in favour of a single law, which might have passed hastily and without due consideration, how strong and cogent is it in favour of a series of laws, on the same subject, from time to time, enlarging and strengthening the same right or claim; and more especially as one of those laws has been passed since the present controversy has arisen, and after the attention of the several branches of the legislature must have been called to the objections now raised against them. With such a weight of prima facie evidence in favour of the constitutionality of these laws, I should not have boldness enough to pronounce them void, without the most clear, satisfactory and unanswerable reasons. I shall proceed, however, to examine the force of the objections which have been raised against the constitutionality of the laws, giving to the appellants the exclusive right to navigate the waters of the state by steam, uninfluenced by any presumption in favour of their validity.

These objections grow out of those parts of the constitution of the United States, which give to congress—First, The power to promote the progress of science and useful arts by securing, for limited times, to authors and *inventors*, the exclusive right to their respective writings and discoveries; and Secondly: The power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. (Art. i. Sec. 8.) It is an undeniable rule of construction, applicable to the constitution of the U. States, that all powers and rights of sovereignty, possessed and enjoyed by the several states, as independant governments, before the adoption of the constitution, and which

are not either expressly or by necessary implication, delegated to the general government, are retained by the states. This has been the uniform understanding of the ablest jurists ever since the formation of that government, and is a rule indispensably necessary, in order to preserve harmony in the administration of the different governments and prevent that collision which a partial consolidation is peculiarly calculated to produce. This was the object contemplated and intended to be secured by the 10th Art. of the amendments of the constitution, which declares, that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. If, then, the grant of the right or privilege claimed by the appellants, would, before the adoption of the constitution, have been a legitimate exercise of state sovereignty, it would, I think, under the rule of construction which I have suggested, be a strained interpretation of that instrument, to say such sovereignty has been thereby surrendered by the state. This power is certainly not denied to the states, or exclusively granted to the union by *express terms*: and those powers which are exclusive, by necessary implication, must be such as are created by the constitution, and which did not antecedently form a part of state sovereignty, or the objects of which, from their nature, are beyond the reach and control of the state governments; an express prohibition to the states, against the exercise of powers of this description, would be useless and absurd. I might go through the various powers given to congress, and illustrate the truth of the position I have laid down, but shall refer only to one or two. Congress have the power to *borrow money on the credit of the United States*. This is an exclusive power by necessary implication. It is a power created by the constitution. No prohibition to the states was necessary, and indeed would have been absurd; because this never was, before the adoption of the constitution, within the scope of that power: no state being able to pledge the credit of the United States, for the re-payment of the money borrowed. The power to constitute tribunals inferior to the supreme court, falls under the same class.

But it is obvious that the mere grant of a power to congress does not necessarily vest it exclusively in that body. Congress has power to lay and collect taxes. But this does not preclude

the states from the exercise of a like power, except so far as they are expressly restrained in relation to duties on imports and exports. Thus we see that there are subjects upon which the United States and the individual states must, of necessity, have *concurrent* jurisdiction; and all the fears and apprehensions of collision in the exercise of these powers, which have been urged in argument, are unfounded. The constitution has guarded against such an event, by providing that the laws of the United States shall be the supreme law of the land, any thing in the constitution or laws of any state to the contrary notwithstanding. In case of collision, therefore, the state laws must yield to the superior authority of the United States.

The power given to congress to promote the progress of science and useful arts is restricted to the rights of *authors* and *inventors*, and their rights are only to be secured for a limited time. Whatever power the states had over these subjects prior to the adoption of the constitution, and which have not been granted to the general government, and which are not within the scope and purview of its authority, must, beyond all possible doubt, be retained by the states. The appellants do not, in the case before us, claim as *inventors*, but only as *possessors* of a mode of applying the steam engine to propel boats on new and advantageous principles. The right, therefore, claimed by them, as granted by the laws of this state, was beyond the reach of congressional authority; and the idea ought not for a moment to be indulged that, even admitting this to be a foreign and imported improvement, it is not worthy of legislative patronage and protection. The power given to congress on this subject was intended for the benefit of authors and inventors, and to secure their rights throughout the United States. The state government could only give this security within its own jurisdiction. It was, therefore, a wise and useful provision in the constitution, calculated to encourage the arts and sciences, which ought to be a favourite object with every enlightened government. But because the states have delegated to congress this power in a limited degree, shall it be denied to them to lend their aid in protecting and patronizing useful improvements in any way they may think proper, not repugnant to the right secured under the authority of Congress? Such a doctrine appears to me degrading to state so-

verignty, and unnecessarily relinquishing a power not contemplated by the constitution. Although, for the purpose of the present suit, the appellants are to be considered as the *possessors* only of the invention, and in which point of view I cannot discover the remotest doubt as to the constitutionality of the laws, the subject matter of them not being within the purview of any power given to congress. But if the appellants are considered the *inventors*, and entitled to a patent, or having actually obtained one, it cannot operate as an exclusion of all legislative authority and interference to aid and protect the right thus obtained under the general government. If the subject matter be within the scope of state jurisdiction, and the power is exercised in harmony with, and in subordination to, the superior power of congress, it is beyond all doubt legitimately exercised. Should any one appear claiming under a patent in hostility to the privilege granted by this state, that would be a paramount right, and must prevail, if set up in a court having jurisdiction of the question; though it may well be doubted, whether even a patent could be set up in the courts of this state against these laws, as that might involve questions under the laws of the United States, which belong exclusively to the courts of the United States. (7 Johnson, 114.) It was admitted by the respondents' counsel, that, had not congress begun to exercise the power given by this clause in the constitution, the subject matter would be within the scope of that jurisdiction—And why this should make any difference, I am unable to conceive, as long as the power exercised by the state is not repugnant to, or incompatible with that exercised by Congress. That the mere grant of a power to congress does not necessarily imply an exclusion of state jurisdiction, has been the practical construction of the constitution in a variety of cases. As for instance—congress have the power to provide for the punishment of counterfeiting the current coin of the United States, yet the legislature of this state has provided for the punishment of the same offence, and numerous other instances might be mentioned if necessary. The only restriction upon the state governments in the exercise of all concurrent powers, is, that the state must act in subordination to the general government. It is not a sufficient reason for denying to the states the exercise of a power, that it *may* possibly interfere with the acts of the general

government. It will be time enough to surrender it when such interference shall arise. The framers of the constitution foresaw the possibility of such a state of things, and wisely provided the remedy, by making the laws of the United States the supreme law of the land. Thus guarded, there can no possible inconvenience result from the two governments exercising legislative authority over the same subject. But for the purpose of deciding the present question, it is necessary to go thus far, because the laws in question extend protection to the appellants as possessors only of the improvement, and this not being a subject within the authority of congress, there cannot arise any interference or collision of power.

The objection to the laws under consideration, on the ground that they interfere with the power given to congress, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," is less colourable than the former; for admitting the power here granted to belong exclusively to the general government, it does not in any manner whatever interfere with these laws, or extend to the rights and privileges which they are intended to secure. They neither concern foreign commerce, nor commerce among the several states, nor with the Indian tribes, but only give to the appellants the exclusive privilege of navigating all waters *within* the jurisdiction of this state by every species of boat or water craft which might be impelled by force of fire or steam. If this can in any sense be considered a regulation of commerce, it is the internal commerce of the state, over which congress has no power; and if the right to regulate internal commerce, or the intercourse between the different parts of the state, ever belonged to the state government, it is still retained, for it never has been either expressly or impliedly yielded to the general government. To deny to the legislature this right, would be at once taking from our statute-book grants almost innumerable of a similar nature; all our turnpike-roads, toll-bridges, canals, ferries and the like, more or less concern commerce, or the intercourse between the different parts of the state, and must depend on the same principles with the privileges granted to the appellants. The truth, however, is, that none of them concern commerce within the sense and meaning of the term as used in the constitution; they are mere municipal regu-

tations, with which commerce has no concern. It can answer no valuable end to enter into any speculative inquiry as to what would be the effect upon the appellants' rights under these laws, should congress, in regulating commerce, interfere with them. No such interference has as yet arisen, and it will be time enough to consider that question when it does arise. The general and conclusive answer, however, to all such supposed collision of powers, is what has already been mentioned—that the laws of congress are paramount, and must prevail.

I have thus noticed the principal arguments which have been urged against the constitutionality of the laws, under which the appellants' claim is set up, and unless these laws are absolutely void, the right of the appellants is clearly established; and the only remaining inquiry is, whether they are entitled to an injunction, to restrain the respondents from an infringement of that right; and this, it appears me, must follow as matter of course. It has been contended that an injunction ought not to issue until the appellants' right has been first settled at law. This is by no means the universal, or even the common rule of practice on the subject. Where the right is doubtful, and that doubt can only be removed by a trial at law, there is some plausibility in requiring of a party, to establish his right before an injunction is granted. But this is not always the course even in doubtful cases. There are many instances in the books, where the courts have said, that possession under colour of title is enough to enjoin and continue the injunction, until it is proved at law that it is only colour, and not real title. The case of *Bolton v. Bull*, (3 Ves. jun. 140) is one of this description. An injunction had been granted that the question as to the validity of a patent might be tried in an action at law. And so doubtful was the right of the patentee, that the court upon a case stated, were equally divided. Yet the lord chancellor refused to dissolve the injunction, declaring that he would not put the party to *compensation*. So also in the case of the universities of Oxford and Cambridge *v. Richardson*, (6 Ves. jun. 707.) Lord Eldon. in noticing what fell from Lord Mansfield, in *Miller and Taylor* "that it was a universal rule, that if the title is not clear at law, the court will not sustain an injunction," said that he could not accede to that proposition, so unqualified, for that there had been many instances within his

own memory, in which an injunction had been granted and continued under such circumstances, until the hearing. The same doctrine is laid down in the case of *Harmer v. Plane*, (14 Ves. jun. 132.) And the lord chancellor says, there will be no less inconvenience in granting the injunction, until the legal question can be tried, than in dissolving it at the hazard, that the grant of the crown may, in the result, prove to have been valid. That the question is not really between the parties upon the record, for unless the injunction is granted, any person might violate the patent, and the consequence would be, that the patentee must be ruined by litigation. This last observation is entitled to great weight and consideration, and furnishes a strong and cogent reason for granting injunctions in cases of this kind. The prevention of multiplicity of suits, is one of the most salutary powers of a court of equity. These cases are sufficient to show, that it is the prevailing practice in England, even where the right is doubtful and the case is sent to be tried at law, to send it *with* an injunction instead of denying it on that ground. But where the right is *clear*, an injunction is never refused, as when the right claimed appears on record, or is founded on an act of parliament, it is matter of course to grant an injunction, without first obliging the party to establish his case at law, (Cooper Equ. Plead. 157, Mitford 129, 1 vol. 476.)

In the case of *Blanchard v. Hill*, (2 Atk. 485.) Lord Hardwicke said, that in case of monopolies, the rule that the court has governed itself by is, whether there is any *act of parliament*, under which the restriction is founded. But the court will never establish a right of this kind, claimed under a *charter only from the crown*, unless there has been action to try the right at law. And this will be found, on examination, to be a governing distinction, running through the numerous cases cited on the argument. And whenever an injunction has been refused, the right was claimed under a patent from the crown, and that right considered doubtful.

Applying these principles to the case before us, there is no possible grounds upon which the injunction can be denied. The claim of the appellants is founded on acts of the legislature, and if those acts are considered valid, no doubt can exist as to the right. And if any doubt should be thought to exist on that point,

yet, according to the established rule in England, this is not sufficient to warrant a denial of the injunction. If it be necessary to send the cause to be tried at law, it ought to be sent *with* an injunction. But where can be the necessity or propriety of sending the appellants into a court of law to establish their right. There are no facts, in dispute, upon which it is requisite for a jury to decide. The right must depend upon the validity of the statutes under which it is claimed. And that question, according to the course of our courts, may be brought back again to this tribunal for ultimate decision. But it is said the right claimed by the appellants, being created by statute, they are entitled to no other remedy than that which the statute gives.

Without examining whether the rule of law upon which this objection is founded, is not confined to criminal cases altogether, it certainly cannot be applied to the present case; for the forfeiture is not given by the same statute which created and gave the right, nor until the right was actually vested in the appellants, by a fulfilment of the terms and conditions upon which they were to be entitled to the exclusive privilege now claimed by them; and if the right was vested, all existing remedies to enforce it were also vested, and are not to be taken away by implication. The act of April, 1808, creating the forfeiture, purports to be an act for the *further* encouragement of the appellants' steam-boats, which plainly shows that the remedies therein provided were intended as *cumulative*, and in addition to those already existing. This would be the construction in criminal cases, even where the offence is created and penalty given by the same statute, provided they are in separate clauses. In the case of the *King v. Harris*, (4 Term, 205.) Ashhurst Justice says, it is a clear and established principle, that where a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause on the ground of its being a misdemeanor.

I think it unnecessary to pursue the question as to the remedy any farther, or to notice all the cases cited on the argument. I have looked into most of them, and am fully satisfied that if the appellants have the right claimed, the remedy cannot be denied to them. I the more readily abstain from taking up any more

time in this examination, because I understood the respondents' counsel as in a great measure abandoning all opposition to an injunction, if the right was determined against them. Upon the whole, from a very attentive examination of the case, I entertain a clear and decided opinion in favor of the validity of the appellants' right, as granted by the acts of the legislature, and that they are entitled to the remedy asked for, to protect and secure them in the enjoyment of it.

I am accordingly of opinion that the decree of the court of chancery ought to be reversed.

KENT, Ch. J. The great point in this cause is, whether the several acts of the legislature which have been passed in the favour of the appellants, are to be regarded as constitutional and binding.

This house sitting in its judicial capacity as a court, has nothing to do with the policy or expediency of these laws. The only question here is, whether the legislature had authority to pass them. If we can satisfy ourselves upon this point, or rather unless we are fully persuaded that they are void, we are bound to obey them and give them the requisite effect.

In the first place the presumption must be admitted to be extremely strong in favour of their validity. There is no very obvious constitutional objection, or it would not so repeatedly have escaped the notice of the several branches of our government, when these acts were under consideration. There are in the whole five different statutes passed in the years 1798, 1803, 1807, 1808 and 1811, all relating to one subject, and all granting or confirming to the appellants, or one of them, the exclusive privilege of using steam-boats upon the navigable waters of this state. The last act was passed after the right of the appellants had been drawn into question, and made known to the legislature, and that act was therefore equivalent to a declaratory opinion of high authority that the former laws were valid and constitutional. The law in the year 1798 was peculiarly calculated to awaken attention as it was the first act that was passed upon the subject, after the adoption of the federal constitution, and it would naturally lead to a consideration of the power of the state to make such a grant. That act was therefore a legislative expo-

erion given to the powers of the state governments, and there were circumstances existing at the time, which gave that exposition singular weight and importance. It was a new and original grant to one of the appellants, encouraging him by the pledge of an exclusive privilege for twenty years, to engage, according to the language of the preamble to the statute, in the "uncertainty and hazard of a very expensive experiment." The legislature must have been clearly satisfied of their competency to make this pledge, or they acted with deception and injustice towards the individual on whose account it was made. There were members in that legislature, as well as in all the other departments of the government, who had been deeply concerned in the study of the constitution of the *United States*, and who were masters of all the critical discussions, which had attended the interesting progress of its adoption. Several of them had been members of the state convention, and this was particularly the case with that exalted character who at that time was chief magistrate of this state,* and who was distinguished, as well in the *council of revision* as elsewhere, for the scrupulous care and profound attention with which he examined every question of a constitutional nature.

After such a series of statutes for the last fourteen years, and passed under such circumstances, it ought not to be any light or trivial difficulty that should induce us to set them aside. Unless the court should be able to vindicate itself by the soundest and most demonstrable argument, a decree prostrating all these laws would weaken, as I should apprehend, the authority and sanction of law in general, and impair, in some degree, the public confidence, either in the intelligence or integrity of the government.

But we are not to rest upon presumption alone; we must bring these laws to the test of a severer scrutiny.

If they are void, it must be because the people of this state have alienated to the government of the *United States*, their whole original power over the subject matter of the grant. No one can entertain a doubt of a competent power existing in the legislature, prior to the adoption of the federal constitution. The capacity to grant separate and exclusive privileges appertains to every sovereign authority. It is a necessary attribute of every

* Mr. Jay.

independant government. All our bank charters, turnpike, canal, and bridge companies, ferries, markets, &c. are grants of exclusive privileges for beneficial public purposes. These grants may possibly be inexpedient or unwise, but this has nothing to do with the question of constitutional right. The legislative power in a single, independant government, extends to every proper object of power, and is limited only by its own constitutional provisions, or by the fundamental principles of all government, and the inalienable rights of mankind. And in the present case, the grant to the appellants took away no vested right. It interfered with no man's property. It left every citizen to enjoy all the rights of navigation, and all the use of the waters of this state which he before enjoyed. There was then no injustice, no violation of first principles in a grant to the appellants for a limited time of the exclusive benefit of their own hazardous and expensive experiments. The first impression upon every unprejudiced mind would be, that there was justice and policy in the grant. Clearly then, it is valid, unless the power to make it be taken away by the constitution of the *United States*.

We are not called upon to say affirmatively, what powers have been granted to the general government, or to what extent. Those powers, whether express or implied, may be plenary and sovereign in reference to the specified objects of them. They may even be liberally construed in furtherance of the great and essential ends of the government. To this doctrine I willingly accede. But the question here is, not what powers are granted to that government, but what powers are retained by this, and particularly whether the states have absolutely parted with their original power of granting such an exclusive privilege as the one now before us. It does not follow, that because a given power is granted to congress, the states cannot exercise a similar power. We ought to bear in mind certain great rules or principles of construction peculiar to the case of confederated government, and by attending to them in the examination of the subject, all our seeming difficulties will vanish.

When the people create a single, entire government, they grant at once all the rights of sovereignty. The powers granted are indefinite, and incapable of enumeration. Every thing is granted that is not expressly reserved in the constitutional char-

ter, or necessarily retained as inherent in the people. But when a federal government is erected with only a portion of the sovereign power, the rule of construction is directly the reverse, and every power is reserved to the members that is not either in express terms, or by necessary implication, taken away from them, and vested exclusively in the federal head. This rule has not only been acknowledged by the most intelligent friends to the constitution, but it is plainly declared by the instrument itself. Congress have power to lay and collect taxes, duties and excises, but as these powers are not given exclusively, the state have a concurrent jurisdiction, and retain the same absolute powers of taxation which they possessed before the adoption of the constitution, except the power of laying an impost, which is expressly taken away. This very exception proves, that without it, the states would have retained the power of laying an impost; and it further implies, that in cases not excepted, the authority of the states remains unimpaired.

This principle might be illustrated by other instances of grants of power to congress with a prohibition to the states from exercising the like powers; but it becomes unnecessary to enlarge upon so plain a proposition, as it is removed beyond all doubt by the 10th article of the amendments of the constitution. That article declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states respectively, are reserved to the states respectively, or to the people." The ratification of the constitution by the convention of this state was made with the explanation and understanding, that "every power, jurisdiction and right which was not *clearly* delegated to the general government, remained to the people of the several states, or to their respective state governments." There was a similar provision in the articles of confederation, and the principle results from the nature of a federal government, which consists only of a defined portion, of the undefined mass of sovereign power, originally vested in the several members of the union. There may be inconveniences, but generally there will be no serious difficulty, and there cannot well be any interruption of the public peace, in the concurrent exercises of those powers. The powers of the two governments are each supreme within their respective constitutional spheres. They may each operate with full effect upon the different subjects, or they may, as in the ca-

ges of taxation, operate upon different parts of the same object. The powers of the two governments cannot indeed be supreme over each other, for that would involve a contradiction. When those powers therefore come directly in contact, as when they are aimed at each other, or at one invisible object, the power of the state is subordinate and must yield. The legitimate exercise of the constitutional powers of the general government, becomes the supreme law of the land, and the national judiciary is specially charged with the maintenance of that law, and this is the true and efficient power to preserve order, dependence and harmony in our complicated system of government. We have then nothing to do in the ordinary course of legislation with the possible contingency of a collision, or with embarrassing ourselves in the anticipation of theoretical difficulties, than which nothing could in general be more fallacious. This doctrine would be constantly taxing our sagacity, to see whether the law might not contravene some future regulation of commerce, or some monied or some military operation of the U. States. Our most simple municipal provisions would be enacted with diffidence, for fear we might involve ourselves, our citizens and our consciences in some case of usurpation. Fortunately for the peace and happiness of this country we have a plainer path to follow. We do not handle a work of such hazardous consequence. We are not always walking *per ignes suppositos cineri doloso*. Our safe rule of construction and of action is this, that if any given power was originally vested in this state, if it has not been exclusively ceded to congress, or if the exercise of it has not been prohibited to the states, we may then go on with the power until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the state authority will so far be controuled, but it still will be good in all those respects in which it does not absolutely contravene the provisions of the paramount law.

This construction of the powers of the federal compact has the high authority of Mr. *Hamilton*. In the 32d number of the *Federalist*, he admits that all the authorities of which the states are not explicitly divested remain with them in full vigor, and that in all cases in which it was deemed improper that a like authority with one granted to the union should reside in the states, there

was the most pointed care in the constitution to insert negative clauses. And he further states that there are only three cases of the alienation of the state sovereignty (1) where the grant to the general government is in express terms exclusive ; (2) where a like power is expressly prohibited to the states ; and (3) where an authority to the states would be absolutely and totally contradictory and repugnant to one granted to the union ; and it must be, he says, an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty. The same view of the powers of the federal and state governments, and the same rules of interpretation, were given by him in the discussions which the constitution underwent in our state convention, and they seem generally, if not unanimously to have been acquiesced in by the members of that very respectable assembly. (See the *debates of the convention* published by *Francis Childs*.) These opinions I regard as being perhaps the best evidence of the sense of the authors of that instrument, the best test of its principles, and the most accurate contemporary exposition to which we can recur. For every one acquainted with the history of those times well knows that the principles of the constitution in the progress of its adoption through the U. States, were discussed in the several conventions and before the public, by the most powerful talents, and with the most animated zeal for the public welfare.— There were many distinguished individuals, and none more so than the one to whom I have referred, who had bestowed intense thought, not only upon the science of civil government at large, but who had specially and deeply studied the history and nature, the tendency and genius of the federal system of government, of which the *European* confederacies had given us imperfect examples, and to which system as improved by more skilful artists, the destinies of this country were to be confided. Principles of construction solemnly sanctioned at that day, and flowing from such sources, are to be regarded by us and by posterity as coming in the language of truth, and with the force of authority.

I now proceed with the application of these general rules to those parts of the constitution which are supposed to have an influence on the present question.

The provision that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, has

nothing to do with this case. It means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights. Their persons and property must in all respects be equally subject to our law. This is a very clear proposition, and the provision itself was taken from the articles of confederation. The two paragraphs under which it is contended that the original power in the state governments to make the grant, is now withdrawn and vested exclusively in the union, are (1) the power to regulate commerce with foreign nations, and among the several states, and (2) the power to secure to authors and inventors the exclusive right to their writings and discoveries.

1. *As to the power to regulate commerce.*

This power is not in express terms exclusive, and the only prohibition upon the states, is, that they shall not enter into any treaty or compact with each other, or with a foreign power, nor lay any duty on tonnage, or on imports or exports, except what may be necessary for executing their inspection laws. Upon the principles above laid down the states are under no other constitutional restriction, and are consequently left in possession of a vast field of commercial regulation—all the internal commerce of the state by land and water remains entirely, and I may say exclusively, within the scope of its original sovereignty. The congressional power relates to external not internal commerce, and it is confined to the *regulation* of that commerce. To what extent these regulations may be carried it is not our present duty to inquire. The limits of this power seem not to be susceptible of precise definition. It may be difficult to draw an exact line between those regulations which relate to external and those which relate to internal commerce, for every regulation of the one, will directly or indirectly affect the other. And to avoid doubts, embarrassment and contention on this complicated question, the general rule of interpretation which has been mentioned is extremely salutary. It removes all difficulty by its simplicity and certainty. The states are under no other restrictions than those expressly specified in the constitution, and such regulations as the national government may by treaty and by laws from time to time prescribe. Subject to these restrictions I contend that

the states are at liberty to make their own commercial regulations. There can be no other safe or practicable rule of conduct, and this, as I have already shown, is the true constitutional rule arising from the nature of our federal system. This does away all colour for the suggestion that the steam boat grant is illegal and void under this clause in the constitution. It comes not within any prohibition upon the states, and it interferes with no existing regulation. Whenever the case arises of the exercise of power by congress which shall be directly repugnant and destructive to the use and enjoyment of the appellants' grant, it will fall within the cognizance of the federal courts, and they will of course take care that the laws of the union are duly supported. I must confess, however, that I can hardly conceive of such a case, because I do not at present perceive any power which congress can lawfully carry to that extent. But when there is no existing regulation which interferes with the grant, nor any pretence of a constitutional interdict, it would be most extraordinary for us to adjudge it void on the mere contingency of collision with some future exercise of congressional power. Such a doctrine is a monstrous heresy. It would go in a great degree to annihilate the legislative power of the states. May not the legislature declare that no bank paper shall circulate, or be given or received in payment but what originates from some incorporated bank of our own, or that none shall circulate under the nominal value of one dollar? But suppose congress should institute a national bank with authority to issue and circulate throughout the union bank notes, as well below as above that nominal value. This would so far controul the state law, but it would remain valid and binding except as to the paper of the national bank. The state law would be absolute until the appearance of the national bank, and then it would have a qualified effect and be good *pro tanto*. So again the legislature may declare that it shall be unlawful to vend lottery tickets, unless they be tickets of lotteries authorized by a law of this state, and who will question the validity of the provision? But suppose congress should deem it expedient to establish a national lottery, and should authorize persons in each state to vend the tickets, this would so far controul the state prohibition, and leave it full force as to all other lotteries. The possibility that a national bank or national lottery might be insti-

tuted would be a very strange reason for holding the state laws to be absolutely null and void. It strikes me to be an equally inadmissible proposition, that the state is divested of a capacity to grant an exclusive privilege of navigating a steam-boat within its own waters, merely because we can imagine that congress in the plenary exercise of its power to regulate commerce, may make some regulation inconsistent with the exercise of this privilege. When such a case arises it will provide for itself, and there is fortunately a paramount power in the supreme court of the United States to guard against the mischiefs of collision. The grant may then be considered as taken subject to such future commercial regulations as congress may lawfully prescribe. And indeed congress have not any direct jurisdiction over our interior commerce or waters. *Hudson's river* is the property of the people of this state, and the legislature have the same jurisdiction over it, that they have over the land, or any of our public highways, or over the waters of any of our rivers or lakes. They may in their sound discretion regulate and control, enlarge or abridge the use of its waters, and they are in the habitual exercise of that sovereign right. If the constitution had given to congress exclusive jurisdiction over our navigable waters, then the argument of the respondents would have applied; but the people never did, nor never intended to make such grant; and congress have concurrent jurisdiction over them no further than may be incidental and requisite, to the due regulation of commerce between the states, and with foreign nations.

And what has been the uniform, practical construction of this power? Let us examine the code of our statute law. Our turn-pike-roads, our toll-bridges, the exclusive grant to run stage-wagons, our laws relating to paupers from other states, our Sunday laws, our rights to ferriage over our navigable rivers and lakes, our auction licences, our licences to retail spirituous liquors, the laws to restrain hawkers and pedlars—What are all these provisions but regulations of internal commerce, affecting as well the intercourse between the citizens of this and other states, as between our own citizens? So we also exercise, to a considerable degree, concurrent power with congress in the regulation of external commerce. What are our inspection laws relative to the staple commodities of this state, and which prohibit the expo-

tation, except upon certain conditions, of flour, of salt provisions, of certain articles of lumber, and of pot and pearl ashes, but a regulation of external commerce? Our health and quarantine laws, and the laws prohibiting the importation of slaves are striking examples of the same kind. So the several provisions in the act relative to the poor, and which require all masters of vessels coming from abroad to report and give security to the mayor of *New-York* that the persons being aliens shall not become chargeable as paupers, and, in case of default, making either the ship or vessel from which the alien shall be landed liable to seizure, is another very important regulation affecting foreign commerce.

And are we prepared to say in the face of all these regulations, and which form such a mass of evidence of the uniform construction of our powers, that a special privilege for the exclusive navigation of a steam-boat upon our waters, is void, because it may by possibility, and in the course of events, interfere with the power granted to congress to regulate commerce? Nothing, in my humble judgment, would be more preposterous and extravagant. Which of our existing regulations may not equally interfere? But it is said that a steam-boat may become the vehicle of foreign commerce, and can then the entry of them into this state or the use of them within it be prohibited? I answer yes, equally as we may prohibit the entry or use of slaves, or of pernicious animals, or an obscene book, or infectious goods or any thing else that the legislature shall deem noxious or inconvenient. Our quarantine laws amount to an occlusion of the port of *New-York* from a portion of commerce for several months in the year, and the mayor is even authorized under those laws to stop all commercial intercourse with the ports of any neighbouring state. No doubt our powers may be abused and exercised in bad faith, or with such jealousy and hostility towards our neighbours as to call for some explicit and paramount regulation of congress on the subject of foreign commerce between the states. Such cases may easily be supposed, but it is not logical to reason from the abuse against the lawful existence of a power, and until such congressional regulations appear, the legislative will of this state, exercised on a subject within its original jurisdiction, and not expressly prohibited to it by the constitution of the *United States*, must be taken to be of valid and irresistible authority.

2. If the grant be not inconsistent with the power to regulate commerce, there is as little pretence to hold it repugnant to the patent power. That goes only to secure for a limited time to authors and inventors the exclusive right to their writings and discoveries; and as this power is not granted by exclusive words to the United States, nor prohibited to the individual states, it is a concurrent power which can be exercised by the states in a variety of cases, without any infringement of the congressional power. A state cannot take away from an individual his patent right and render it common to all the citizens. This would be to contravene the act of congress, and would be unlawful. But if an author and inventor, instead of resorting to the act of congress, should apply to the legislature of this state for an exclusive right to his production, I see nothing to hinder the state from granting it, and the operation of the grant would of course be confined to the limits of this state. Within our own jurisdiction it would be complete and perfect. So a patentee under the act of congress may have the time of his monopoly extended by the legislature of any state beyond the fourteen or twenty-eight years allowed by that law—congress may secure for a limited time, an exclusive right throughout the union, but there is nothing in the constitution to take away from the states the power to enlarge the privilege within their respective jurisdictions. The states are not entirely divested of their original sovereignty over the subject matter, and whatever power has not been clearly granted to the union remains with them. So also the grant to congress goes no further than to secure to the author or inventor a right of property, and that property, like every other species of property, must be used and enjoyed within each state. The power of congress goes only to ascertain and define the right of property, but does not extend to regulate the use of it. That must be exclusively of local cognizance. If the author's book or print contains matter injurious to the public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains with the states to restrain the use of the patent right. That species of property must likewise be subject to taxation and to the payment of debts as other personal property. The national power will be fully satisfied if the property created by patent be for the given

time, enjoyed and used exclusively *so far* as under the policy of the several states the property shall be deemed fit for toleration and use. There is no need of giving the patent power any broader construction in order to attain the ends for which the power was granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts. If then the respondents were in possession of a patent for the steam-boat as original inventors, our statute prohibition, not being made against the use of steam-boats as *per se* injurious, would possibly, before a competent tribunal, be obliged to yield to the patent right as being founded on the paramount law.* But even this plea would not answer in this case, for if the respondents were in possession of such a patent the state court could not take notice of it. They cannot enforce a patent right, nor can they declare the patent void, if obtained by fraud or imposition. The acts of congress have vested the federal courts with exclusive cognizance of all infringements of patent rights, and such was lately the opinion and decision of the supreme court of this state (*Parsons v. Barnard*, 7 Johnson, 144); none of our courts could receive a plea of a patent right in justification of a breach of the statutes, and we should be obliged to send the party to the courts of the United States in order to test the validity of his patent and to seek the competent redress. But the respondents show no patent, and the appellants have not obtained their grant as *inventors* of the steam boat, and therefore the privilege is totally unconnected with the patent power. It seems to be admitted that congress are authorized to grant patents only to the inventor of the useful art. The act of congress of the 25th February, 1793, (*Laws United States*, vol. 2, page 200) applies only to the inventor, and the applicant for the patent must make oath that he believes he is the true inventor or discoverer of the art or improvement. The act of the 22d April, 1800, (*Laws United States*, vol. 5th, 88) extends the benefit of the former law to aliens of two years' residence, on their making oath that such invention, art or discovery, hath not to their belief been

* The idea here intimated hypothetically, was not necessary to the argument, and on more reflection, I think that even this intimation may lead to error. I wish, then, not to be understood as saying that a state grant can, in any case, or before any tribunal, be questioned and controlled by a patent right.

known or used either in this or any foreign country. There cannot then be any aid or encouragement by means of an exclusive right under the law of the United States to the importer from abroad of any useful invention or improvement. Such persons must resort to the patronage of the state governments, where the power to reward their expensive and hazardous exertions was originally vested and in whom it remains still. The grant of 1798 was made to chancellor Livingston as "the *possessor* of a mode of applying the steam-engine to propel a boat on new and advantageous principles." This power to encourage the importations of improvements by the grant of an exclusive enjoyment for a limited period, is extremely useful, and the *English* nation have long perceived and felt its beneficial effects. This will appear by a cursory view of the law of that country.

The creation of monopolies was anciently claimed and exercised as a branch of the royal prerogative. Lord Coke (8 Inst. 181) defines a monopoly to be "an institution or allowance by the king's grant for the sole using of any thing;" and he considers such royal grants to have been against the ancient and fundamental laws of the realm. Parliament at length interposed to check the abuse of these grants, which had been issued under Elizabeth with inconsiderate profusion, and by the statute of 21 J. 1. c. 3. commonly called the statute of monopolies, there were due limitations placed upon the exercise of this branch of the prerogative. The statute by a general sweeping clause demolished all the existing monopolies that were not specially excepted, and some of these exceptions are worthy of our particular notice. In the first place, all grants and privileges by act of parliament were saved, for no one ever doubted, unless it be since the origin of this controversy, of the power of the legislature to create an exclusive privilege. The statute also allowed grants to be made for a limited time by the authority of the crown, for the sole working or making of any new manufacture *not before used within the realm*. Upon this clause it has been held by such distinguished judges as *Holt* and *Polexfen*, (case of *Edgberry v. Stephens*, 2 Salk. 447,) that if the invention be new in England a patent may be granted though the thing was practised beyond sea before; for the statute, as they observe, intended to encourage new devices useful to the kingdom, *and whether learned by*

travell or by study, it is the same thing. And in the case of *Darcy v. Allen*, which arose under Elizabeth before the statute of monopolies (11 Co. 84, Noy 173) it was admitted in the interesting argument on the part of the defendant, as preserved in Noy, p. 182, 3, that where any man by *his own charge and industry* or by his own wit or invention doth bring any new trade into the realm, or any engine tending to the furtherance of a trade, that never was used before, and that for the good of the realm, the king might grant a monopoly patent. Thus in 9th Eliz. there was a patent granted to Hastings for the sole making and selling for divers years of *Frisadors*, in the consideration that he brought in the skill of making them *as they were made in Holland*. But in a suit on this patent, as it appeared that the defendant had used them before the patent, he was held not punishable for infringing the patent. So a like patent issued in the beginning of Eliz. to one Mathey, for making certain knives with bone shafts, &c. on the suggestion that he brought the first use thereof *from beyond the sea*, but as the suggestion was false, he on that ground alone lost the benefit of his patent.

These cases clearly show that the uniform opinion in *England*, both before and since the statute of *James*, has been, that imported improvements no less than original inventions ought to be encouraged by patent.—And can we for a moment suppose that such a power does not exist in the several states? We have seen that it does not belong to congress, and if it does not reside in the states it resides no where, and is wholly extinguished.—This would be leaving us in a state of singular and contemptible imbecility. The power is important in itself and may be most beneficially exercised for the encouragement of the arts, and if well and judiciously exerted it may ameliorate the condition of society by enriching and adorning the country with useful and elegant improvements. This ground is clear of any constitutional difficulty, and renders the argument in favour of the validity of the statutes perfectly conclusive—And permit me here to add, that I think the power has been wisely applied in the instance before us to the creation of the privilege now in controversy. Under its auspices the experiment of navigating boats by steam has been made, and crowned with triumphant success. Every lover of the arts, every patron of useful improvement, every friend to his country's honor,

has beheld this success with pleasure and admiration.—From this single source the improvement is progressively extending to all the navigable waters in the United States, and it promises to become a great public blessing by giving astonishing facility, despatch and safety not only to travelling, but to the internal commerce of this country. It is difficult to consider even the known result of the undertaking without feeling a sentiment of good-will and gratitude towards the individuals by whom they were procured, and who carried on their experiment with patient industry, at great expense, under repeated disappointments, and while constantly exposed to be held up as dreaming projectors to the *whips and scorns of time*.—And so far from charging the authors of the grant with being rash and inconsiderate, or from wishing to curtail the appellants of their liberal recompence, I think the prize has been dearly earned and fairly won, and that the statutes bear the stamp of an enlightened and munificent spirit.

If the legal right be in favor of the appellants, the remedy prayed for by their bill is a matter of course. One of the learned counsel for the respondents, with his usual frankness, seemed in a great degree to concede this point.—Injunctions are always granted to secure the enjoyment of statute privileges of which the party is in the actual possession, unless the right be doubtful.—This is the uniform course of the precedents.—I believe there is no case to the contrary, and the decisions in the *English* Chancery on this point were the same before and since the American Revolution, and we are consequently bound by them as a branch of the common law.—It appears by the facts stated in the bill, and which we must take to be true, as they have been sworn to, and are not answered or denied, that the appellants had been for three years in the actual and exclusive enjoyment of their statute privilege, when the respondents interfered to disturb that right and that enjoyment.

It will be necessary to attend for a moment to the most prominent *English* cases on the subject of Injunctions, and on this point I shall be very brief.

In *Gyles v. Wilcox*, which was as early as the year 1740 (2 Atk. 141. 3 Atk. 269, S. C.) there was a bill filed for an injunction to stay the printing of a book, on suggestion that the book pretending to be a different work, was in truth an invasion of the

complainant's copy right under the statute of Anne.—The Lord Chancellor referred the cause by consent to arbitrators, to examine whether the one book was a copy from the other; and though that point was not clear, he allowed an injunction and continued it in the mean time. So also in the case of *Blackwell v. Harper*, in the year 1740 (2 Atk. 92) a bill was exhibited to establish a right under the statute of 8 G. 2, c. 13, for encouraging the arts of designing, engraving, &c. and to restrain the defendant from copying the complainant's engravings of medicinal plants, and an injunction was decreed, though the statute said nothing about an injunction, and had given as against the offender a forfeiture of the plates and sheets engraved, and an additional penalty of 5s, for every print, to be recovered by suit at law.—In another case in the year 1750, before the same Chancellor (1 Ves. 476) he admitted that when the right appeared by matter of record, or was grounded upon an act of parliament, it was a foundation for an injunction before answer.—These cases I have particularly selected, because two of them were cases of injunction founded on a statute right, and where the statute had also given a forfeiture, and because these cases were long before our revolution, and were decisions of so correct and distinguished a Chancellor as Lord Hardwicke.

It is impossible in any cause, to produce cases more in point and more controlling; and they put the authority and the duty to grant an injunction in a case of clear statute right, beyond contradiction. There are many other cases in the *English* Chancery to the like effect, and which I shall not stay to examine (*Baskett v. Parsona*, 1718, decided by Sir J. Jekyl, and cited in 13 Ves. 493, *Smith v. Clark*, *Dickins*, 445. *Hicks v. Raincock*, *Dickins*, 647. *Pope v. Carl*, 2 Atk. 342, *Bell v. Walker* and others, 1. Bro. 451.) It will be sufficient by referring to a few other cases to show the uniform language of the equity courts. The case of the *City of London v. Pugh* (3 Bro. c. C. 374,) arose as early as 1727, and as was decided by the House of Lords upon appeal, it merits the more attention. The question then arose on a penalty given by a lease of 100l an acre for digging up the soil, and yet the court ordered that the Chancellor issue an injunction until the hearing to stay the trespass, notwithstanding the party had his remedy for the penalty. In the case of *Bolton v. Bull*, which arose in Chancery

so late as 1716, (3 Ves. 140) there was a bill for an injunction against infringing a patent right for a fire-engine, and it was granted while the validity of the patent was left in the mean time to be tried at law. It was there admitted to be the most ordinary jurisdiction of the court of Chancery not to alter the possession until the right was decided and the party in enjoyment of his patent privilege was considered in such possession. In a late case before the present Lord Chancellor Eldon, (*The Universities v. Richardson*, 6 Ves. 707,) he held that in the case of a patent right, if the party gets his patent and puts it in execution, his possession under colour of that title is good enough to enjoin a disturber from interfering, and to continue the injunction until it be proved at law, that he had no title. And in a still later case (14 Ves. 130) the court expressed itself in strong terms against the invasion of a patent right, and said that unless the injunction be granted, any person might violate the patent and the consequence would be that the patentee would be harassed with litigation.

I cite these latter cases to show that the law has been settled in *England* for the last seventy years at least, and has been preserved in a steady uniform course under a succession of their ablest and wisest men.—The principle is that statute privileges, no less than common law rights, when in actual possession and exercise, will not be permitted to be disturbed, until the opponent has fairly tried them at law and overthrown their pretension. And is not this a most excellent principle, calculated to preserve peace and order and morals in the community, and if it was not the law, yet deserving to be the law and well worthy of our encouragement and sanction? The Federal courts in this country have thought so, for under the patent law of Congress they have equally protected the right by injunction. The case of *Morse v. Reid*, was an injunction bill filed in 1796, to restrain the defendant from reprinting *Winterbotham's History*, which the complainant alledged was an invasion of the copy-right of his *American Geography*. The propriety of the injunction was not questioned—it issued in the first instance. The complainant received 1500 dollars damages, and the injunction was made perpetual—So in the late case of *Whitney v. Fort*, which arose in *Georgia*, upon a violation of complainant's patent for a machine for cleaning cotton. An injunction was granted in the first instance, and was afterwards

made perpetual at the Circuit Court, at which Judge Johnson presided. As far then as authority goes, it is in favour of the injunction, and if we are satisfied in this case of the complainants' right we cannot hesitate about the remedy. The act that the Legislature passed the last winter, making it expressly the duty of the Chancellor to grant an injunction as to all other boats than the two then built, proves very clearly the sense of the legislature, that this is a fit and proper remedy in the case. Those two boats were excepted out of the law, merely because it was improper to interfere with a pending suit and the statute did not impair the pre-existing remedy by injunction—it only made it more clear and peremptory thereafter, and there is no reason why the injunction should issue against one set of boats and not against another.

It would only be productive of litigation and mischief to allow the respondents to continue the use of their boats if the right be against them. Their counsel admit that they must not only forfeit the boats, but must answer in damages for all the intermediate profits. If the legal right be with the appellants, this is the proper court, and this is the proper time to declare it. The court from its peculiar constitutional structure, unites with it the highest court of common law, and nothing could be more useless than to withhold an injunction until the Chancellor had sent the question to be tried at law, when the judges before whom it was tried, are members of this court, and have already declared their opinion. The legal questions can never be tried by a jury. It is not a question of fact. The single point is the constitutionality of the statutes.—That point can never be more fully and more ably argued than it has been before this court, and if we are of opinion that the acts are constitutional they *must* be obeyed—We are bound to cause them to be obeyed—There is no escape from this duty.

If we refuse this injunction, it ought to be for some substantial reason—We must not put it upon the mere *hoc volo, sic jubeo, sit pro ratione voluntas*. There must be some solid principle, that will correspond with the character, as well as satisfy the conscience of this court. If the laws are valid, it would be of pernicious consequence not to arrest the further progress of their violation. It is impossible for any act to be committed which attracts more universal notice, and if wrong and illegal, none which has a more fatal influence upon the general habits of respect and reve-

rence for the legislative authority. The boats cannot run but in the face of day, and in the presence, as it were, of the whole people, whose laws are set at defiance, nor without seducing thousands by the contagion of example, into an approbation and support of the trespass.

I am sensible that the case is calculated to excite sympathy—I feel it with others, and I sincerely wish that the respondents had brought the laws to a test at less risk and expense; for every one that had eyes to read or ears to hear the contents of our statute book, must have been astonished at the boldness and rashness of the experiment: but in proportion to the respectability and strength of the combination, should be the vigour of our purpose to maintain the law. If we were to suffer the plighted faith of this state to be broken, upon a mere pretext, we should become a reproach and a by-word throughout the union. It was a saying of *Euripides*, and often repeated by *Cæsar*, that if right was ever to be violated, it was for the sake of power. We follow a purer and nobler system of morals, and one which teaches us, that right is never to be violated—It ought to be kept steadfast in every man's breast, and above all, it ought to find an asylum in the sanctuary of justice.

I am accordingly of opinion, that the order of the Court of Chancery be reversed, and that an injunction be awarded.

With the foregoing opinions the court unanimously concurred.

Whereupon,

The Chief Justice moved the following *Rule* be entered, which was unanimously adopted:

Whereupon, after hearing counsel as well for the appellants as for the respondents, upon the order of the Court of Chancery, complained of by the appellants, and considering and hereby declaring the exclusive privilege granted by the legislature of this state to the appellants, as mentioned in their bill of complaint, valid, and that the same ought to be enjoyed by them according to law:

It is, therefore, ordered, adjudged and decreed, and this court doth accordingly order, adjudge and decree, that the order of the Court of Chancery, complained of, be *reversed*. And this

court doth further order, adjudge and decree, that a writ of Injunction issue, restraining and prohibiting the respondents from using and employing the boat or vessel called the *Hope*, in the bill mentioned, on any of the waters of this state, in contravention of the legislative grant and privilege made to and vested in the appellants, as in their bill set forth; and that such Injunction be continued until the final hearing of the cause in the Court of Chancery, and that the same injunction ought then to be made perpetual so long as the exclusive right and privilege of the appellants shall continue under the acts of the legislature of this state, in the bill set forth; unless, on the final hearing of the cause, the equity contained in the appellants' bill shall be destroyed by the new matter to be set forth and established by the respondents.

And it is further ordered, adjudged and decreed, that the record be remitted to the Court of Chancery, to the end that the order, judgment and decree of this court may be forthwith executed, by awarding such injunction.

RULES

OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW YORK.

At a District Court of the United States, held in and for the New York District, on the twenty-fourth day of May, 1809, present the Honourable Matthias B. Tallmadge, Esquire, District Judge, the following rules were established by the court for the government of the practice thereof:

Ordered, I. That when a libel shall be filed in this court, except in case of libels for seamen's wages, the clerk shall, of course, issue the usual and proper process to the marshal.

II. That all writs for the sale of property, in pursuance of any order or decree of this court, except on libels for seamen's wages, shall be made returnable at a stated term of the court, and that the marshal shall, upon the return of every such writ, pay into court the gross amount of the monies arising from such sale.

III. That in cases of condemnation, where bonds have been executed for the payment of the appraised value of property, and

in cases of mitigations of forfeitures by the secretary of the treasury, the gross amount of the monies payable in either case, shall be paid into court.

IV. That in the several cases before mentioned the costs and charges of the suit shall be taxed, and first paid out of the monies in court.

V. That in cases where any collector of the customs is entitled to receive the monies in court, the same, after deducting the costs, shall be paid to the marshal, to be by him paid over to the collector.

VI. That all monies paid into this court be forthwith deposited by the clerk in the office of the Manhattan Company in the city of New York, that the clerk open an account with the said office as clerk of the district of New York, that all checks for monies so deposited shall be drawn and signed by him as clerk, that his account as clerk with the said office shall at all times be open to the inspection and examination of the judge of this court and the attorney of the United States, and that the clerk exhibit to the court on the first day of each term of August and February a full statement or account of all monies in his hands as clerk, distinguishing the amount in each cause respectively.

VII. That the clerk shall provide a book, in which he shall keep a full and particular account in each cause depending in this court of all monies brought into court and of the payment thereof; and that such book and the accounts therein shall at all times be open to the inspection and examination of the judge of this court, the attorney of the United States, and the marshal of the district, and that any particular account in such book shall also be open to the inspection of any person interested therein.

VIII. That the marshal, his deputies, and all other persons concerned in the service of any process of this court be and they are hereby respectively prohibited from becoming bail to the arrest in any suit depending in this court, and also from becoming special bail in any suit unless for the purpose of surrendering the defendant, in which case the surrender shall be made within eight days after special bail shall be put in.

IX. That in every suit in this court in which the United States shall be plaintiffs, or in which they shall be interested though not plaintiffs, and in which the defendant shall be held to bail, the

assignment of the bail bond and the acceptance thereof by the plaintiff's attorney shall not be deemed to preclude him from excepting to the sufficiency of the special bail put in in the suit, if the bail to the arrest shall become special bail in the suit, but the marshal shall nevertheless be held responsible for good bail, in like manner as if the bail bond had not been signed and accepted as aforesaid.

X. That in every recognisance of bail in a civil suit depending in this court the sum for which the suit is instituted shall be expressed, and every notice of bail shall also express the sum demanded in the suit.

XI. That no plea shall be received in any suit instituted in this court upon a bond executed to the United States for the payment of duties, or in any suit instituted upon a bail bond taken in consequence of such suit, unless such plea shall be accompanied by an affidavit of the truth of the matters in the said plea contained.

XII. That in suits upon bonds for the payment of special duties, special bail shall be put in on the return day of the writ, and upon the return of *cepi corpus*, in cases where special bail is required and the plaintiff is by law entitled to judgment at the return term, unless the defendant shall put in bail, and the bail if excepted to justify on the first day of the term, *sedente curia*, the plaintiff may sue out process on the bail bond tested on that day and made returnable on any other day of the same term or in the ensuing vacation, and upon the return of such process with the defendant's appearance indorsed thereon, may proceed according to the course of the court to judgment and execution as of the preceding term, unless the defendant shall interpose a plea, but no plea shall be received or filed without an affidavit verifying the facts therein contained accompanying it, and judgment may be entered in the vacation as of the preceding term, in the same manner where special bail shall be put in and perfected, unless a plea shall be received subject to the same restriction.

XIII. That application for the appointment of appraisers of vessels or goods, of commissioners to take evidence, or the approbation of sureties by the court, shall be upon notice of a motion for the purpose naming and particularly describing the appraisers, commissioners, or sureties, which notice shall be served upon

the adverse party or his attorney two days exclusively before the same shall be heard.

XIV. That the clerk of this court be, and he hereby is appointed a commissioner before whom appraisers of vessels or goods, wares and merchandize seized for breach of any law of the United States may be sworn or affirmed.

XV. That appraisers acting under the authority of this court shall be severally entitled to receive three dollars for each day actually employed in making appraisements, to be paid by the party at whose instance the same shall be ordered.

XVI. That no vessel, goods, wares, or merchandise in the custody of the marshal of this court shall be released from detention, upon appraisalment and surety, until the costs and charges of the officers of this court, thereupon to be allowed and taxed by the court, so far as the same have then accrued, shall first be paid by the party at whose instance the appraisalment shall be ordered.

XVII. That monies paid into court shall not be paid out in pursuance of any decree of the court upon which an appeal may be had, until ten days shall have elapsed after such decree shall be made.

XVIII. That when an appeal shall be entered, the appellant shall within ten days from the time of making the decree give security for damages and costs, and if security shall not be given within that time, the decree may be executed as if there had been no appeal.

XIX. That the appellant shall give two days' notice to the adverse party, or his attorney, of the person or persons proposed as his sureties, with their additions and descriptions, and of the time and place of giving the security before the court or the judge.

XX. That every petition to the judge of this court for the remission or mitigation of any fine, penalty or forfeiture, shall state whether any suit has been instituted for the recovery of such fine, penalty or forfeiture, or not, as the case may be, and if any suit has been instituted, what proceedings have taken place therein, and in what state of proceedings such suit is at the time of preferring the petition.

XXI. That when a petition is intended to be presented to the judge of this court, for the remission or mitigation of any fine,

penalty, forfeiture or disability, a copy of the petition, with a notice of the time and place of presenting the same shall be served on the attorney of the United States, and another copy of the petition and notice shall be served on the person or persons claiming the fine, penalty or forfeiture, four days before the time of presenting the petition.

XXII. That the clerk of this court shall cause the statement of facts appearing on the summary inquiries upon the matters of such petition, to be served on the attorney of the United States before the same shall be transmitted to the secretary of the treasury, and unless the said attorney shall file objections thereto within four days after such service, the same may be transmitted of course.

XXIII. That whenever any person is convicted of any offence under the 50th section of the collection law, it shall be the duty of the clerk of this court to certify such conviction within eight days thereafter, together with the name and addition of the person convicted, to the collector in whose district the goods, wares and merchandize shall have been landed contrary to the provisions of the said act.

XXIV. That all notices required to be published in pursuance of any of the proceedings of this court, shall be inserted in the newspaper printed in the city of New York, entitled "American Citizen," and in cases of seizures made in this state out of the district of the city of New York, such notices shall also be published in some newspaper printed near the place of seizure.

XXV. That counsellors of the Supreme Court of this state may be admitted as attornies, proctors and advocates of this court.

XXVI. That the clerk of this court be, and he is hereby prohibited from practising in this court in all cases whatever.

XXVII. That in all cases not specially provided for by rules of this court, the rules and practice of the Supreme Court of this state, so far as the same may be applicable, shall regulate the practice of this court.

XXVIII. That all former rules for the regulation of the practice of this court be vacated.

By order of the court,

CHARLES CLINTON, *Clerk*.

ADDITIONAL RULES.**SEPTEMBER 18, 1809.**

XXIX. Ordered, That when an appeal shall be entered in this court, the appellants shall cause the proceedings required by law, to be transmitted to the Circuit Court to be transcribed for that purpose within thirty days after the appeal shall be entered in this court; and that, in default thereof, the decree of this court may be executed as if there had been no appeal, unless the court or the judge shall, on special motion of the appellant, otherwise order.

XXX. Ordered, That the clerk of this state pay into the office of discount and deposit of the Bank of the United States, all monies which are or may arise from condemnations of property seized by officers of the navy and which may belong to the United States as their moiety of the proceeds of such property.

GENERAL SESSIONS.

NEW YORK, Aug. 21.

The People v. Edward Ferris and others.

Indictment for a riot.

CHARGE

At the Hon. De Witt Clinton, Mayor of the city of New York, to the Jury, in the above trial

Gentlemen of the Jury,

THIS is an indictment for a riot committed in Trinity Church, during the commencement of Columbia College, and while the professors were performing the duties appertaining to that occasion. There are eight persons indicted. Of these, one* pleads guilty, and submits to the mercy of the court. Another† must be acquitted by you, as there is no evidence of any participation by him, in the disturbances of the day. It becomes your duty, therefore, to inquire whether the remaining six be guilty or not.

Gentlemen—Whatever may be the charge of the court in this trial, I trust, that you will not think it in any way tinctured with feeling. You must be persuaded that the court is well disposed towards the defendants. They were persons of respectable standing in society, and most of them young gentlemen just en-

* William G. Urahm.

† Charles Dickinson, Junr.

tering on life. If the charge which is about to be delivered to you, appears very decisive, and to bear hardly on the defendants, I trust that you will find it warranted by the evidence, and sanctioned by that honest indignation which every man must feel for the violated majesty of the laws.

It is not necessary, gentlemen, to recapitulate all the evidence in this trial. It has already been stated to you very minutely by the district attorney, and you will be able to apply it to each of the defendants, and thereby ascertain his respective guilt. A brief narration of the principal facts, however, will be indispensable, in order to put this cause in its true light.

It appears, gentlemen, that the riot with which the defendants are charged, took place while the college of this city was solemnizing its annual commencement in Trinity Church. The immediate cause of the disturbances originated in the contumacious behaviour of Mr. John B. Stevenson, one of the defendants, a graduate, in refusing to comply with some corrections which the professors had deemed essential, in the parts assigned to him, in the oratorical performances of the day. It seems that this gentleman was a respondent in a forensick discussion, and to him was assigned the duty, after the other parties in debate had delivered their arguments on both sides, to pronounce the most approved doctrine, on the subject of discussion. It is in evidence before you, that when this young gentleman subjected his thesis to the examination of his professors, there was one sentiment which they deemed it judicious to correct. It was corrected so as to meet the ideas of the professors. The correction was received with hesitation and reluctance on the part of Mr. Stevenson. He was, however, apprised that the corrections must be adopted by him ; that he was bound to submit to them ; and, moreover, that there was a statute of the college which rendered it impossible for the professors to confer a degree on him, if he contumaciously refused to do so. After some difficulty the piece was adopted with its corrections. Nothing more transpired on the subject, until the day of the commencement, when, to the surprise of the professors, Mr. Stevenson delivered his speech as originally written by himself, totally disregarding the corrections which had been made. After he had finished the part assigned to him, he was privately called aside, and admonished by the professors. They

expostulated on the impropriety of his conduct, and stated to him that as he had infringed the laws of the college, it became impossible to confer a degree on him, without a manifest violation of their duty. They, therefore advised him not to go on the stage to receive it, as it could not be conferred on him. Stevenson disregards the orders of the professors, mounts the stage and demands his diploma. It is refused. "I demand it," says Stevenson, "in the name of the trustees," and suddenly addressed himself to the audience, and attempted to explain the cause of the diploma being refused to him. Here it is, gentlemen, that the disturbance commences. Shouting, and clapping, and hissing, and wild uproar. Maxwell, (one of the defendants) goes on the stage, and appeals to the audience. Mr. Verplank, (another of the defendants) follows and demands of Mr. Mason, the Provost, the reasons of the diploma being refused to Mr. Stevenson? "The reasons," exclaims Verplank, "are not satisfactory—Maxwell must be supported!" And thereupon turns to the audience, and moves, "that the thanks of the meeting be given to Mr. Maxwell for his spirited defence of an injured man." Here the uproar increasing, all becomes disorder, and confusion, and riot. "Hustle the officers." "Bring forth the Provost!" "Three groans for the Provost!" and such riotous acclamations ensued. Mr. Ferris runs through the middle of the aisle, his fists clenched, and raised in the attitude of menace and violence, crying, "tyranny," "oppression." In fine, gentlemen, the scene was such, if you believe the testimony, as was never exceeded on any occasion whatever, unless, as has been emphatically stated, it was that memorable riot, best known as the *Doctor's Mob*; a tumultuous insurrection, as you all know, which carried dismay and horror through this city. The scene of riot and disgrace, so excited in the church, continued, as has been proved, about three quarters of an hour, or an hour. The duties of the day were entirely interrupted, and the professors quitted the church without consummating the solemnities of the occasion.

Such, gentlemen, are the principal facts developed in this cause. In palliation of the monstrous indignity offered the laws, the counsel for the defendants have urged, with more zeal than the matter deserved, that there was no statute of the university which vested in the professors the power of compelling the stu-

dents to abide the corrections made in their rhetorical performances, and that they have no authority for denying to a graduate his degree should he refuse to adopt those corrections. This is a point very strenuously contended for by the defendants' counsel, but it is one that is totally immaterial in this trial. It requires no private law to vest that power in the professors. It is vested in them impliedly, being a power inseparable from their functions, and essential to the due performance of their duties. There is no positive law which gives a schoolmaster a right to correct his pupils—yet it is universally acknowledged. And the professors of a college, as the conservators of the morals of their students, and the supervisors of their studies, have necessarily and impliedly the general superintendence of the conduct and studies of their scholars. It is their duty to see that there be nothing improper or immoral in the conduct of their disciples, and that they imbibe no notions incompatible with the principles of morality and religion. Shall it then be said that a professor has not the power to correct the literary performance of the student? What if any licentious extravagance should creep into the compositions of a collegian? Shall it be ushered to the world, sanctioned by the professors, as it necessarily would be if permitted to emanate from their hands? Surely every reflecting man must perceive in the consequences which such a doctrine would entail upon society, the futility of the doctrine itself. It is well known that we are divided into parties both in religion and politics. A student, if suffered to utter his crude and undigested ideas, might excite the disgust, or the angry passions of the auditory, and thereby stir up tumultuous and riotous disturbances. For example—What if a student should attempt to establish the non-existence of the Deity, or to anathematize the constituted authority of the country: shall there not be vested in the professors a discretion and judgment as to the fitness of these subjects for public discussion? Undoubtedly so—And it was the duty of Mr. Stevenson to have submitted with silent deference to the better judgment of his masters, and not to have dared to array his private opinions, in opposition to those of superior age and intelligence.

And you will readily perceive, gentlemen, that there must be vested necessarily in the professors, a discretion as to the propri-

ety of granting diplomas to the graduates; a discretion to be exercised by the professors after a full view of the conduct and merits of the scholar, during the whole term of his study. For there may be occasions, when, if this power be not vested in them, the student may get his degree in spite of the most unwarrantable behaviour. What, if a student act in the most refractory manner on the very day assigned for conferring degrees, shall there not be a power in the professors of refusing him the literary honours which otherwise would be awarded to him? But it were useless, gentlemen, to press the discussion of these points further. It must be evident to you, that the defendants can derive no kind of palliation of their offence from these arguments.

It is said also, gentlemen, that the disturbance excited by the defendants, was not a riot in the legal acceptation of the term, and that therefore the defendants cannot be convicted under this indictment. A riot, it is said, requires a preconcert; or a design previously conceived, and afterwards consummated; and that as there was no previous design in this case, that the tumult which took place in the church, was merely either an affray or a rout, and to prove this Hawkins has been cited, where a riot is described to be "a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." (Hawkins, B. i. p. 51.) The definition of a riot, gentlemen, has hitherto been involved in obscurity. The definition of it laid down by Hawkins, is undoubtedly bad. If it require preconcert on the part of those who create the disturbance, then those only who shall have taken part in the deliberation anterior to the disturbance, could be convicted as rioters. If this be true, then, a person who might accidentally have taken part in a tumult, although he may have been one of the most active agents, could not be punished as a rioter, unless the preconcert or previous design was brought home to him. But this, I apprehend, is not law. It requires no previous design or preconcert in order to

constitute a riot. It requires barely a *concert of action*. People may assemble legally and peaceably, and yet create a riot. A riot, says Blackstone, is "where three or more actually do an unlawful act of violence, either with or without common cause." "A rout is where three or more do meet to do an unlawful act upon a common quarrel, and make some advance towards it." "An affray is the fighting of two or more persons in some public place to the terror of his majesty's subjects." It will be readily perceived by you, that this assembly was not a rout, because the disturbance was actually consummated. And you cannot call it an affray, for it was not a fight in a public place. What then was this disturbance. It was undoubtedly a riot. It completely answers Blackstone's definition of a riot. It was "the actual doing of an unlawful act of violence by three or more persons."

If it was not a riot, what was it? It has been shown to you that it was not an affray, and that it was a rout; nor was it an "unlawful assembly." If therefore it was not a riot, it was some offence not cognizable by our laws. And we are then reduced to this dilemma, that there may exist a most disgraceful and outrageous violation of the public peace, a tumultuous insurrection that may endanger our property, our lives, and our liberties, and there shall be no power in the law to punish it. This is a legal solecism. These men are undoubtedly guilty of a riot. Would you not call it a riot, if a part of a congregation, taking offence at the doctrines of the preacher should excite an outrageous disturbance in the church? And would it not be a riot if the by-standers in this court, disliking the decision of the judges, should violently force them from their benches. And yet there might be no preconcert, no previous design, but an instantaneous and illicit insurrection.

It has been urged too by the counsel for the defendants, that there is no count in the indictment, on which the defendants can be convicted. One count charges the defendants with a riot, with an intention of compelling the trustees of Columbia College to confer the degree of Bachelor of Arts on John B. Stevenson. Another charges them with a riot for the purpose of hindering the trustees of Columbia College from conferring the degree of Bachelor of Arts on certain students. And the last count charges them with a riot generally. Without expatiating on the argu-

ments of the counsel on this branch of the defence, it will be sufficient to state to you, that, even if the two first counts be faulty, the last will comprehend the misdemeanor of the defendants, and completely warrant your finding them guilty.

Such then, gentlemen, are the facts developed in this trial, and such has been the defence set up by the defendants. It becomes now the duty of the court to pronounce its judgment. We have no hesitation in declaring that the disturbance which took place on the occasion alluded to, is the most disgraceful, the most unprecedented, the most unjustifiable, and the most outrageous that ever came within the knowledge of the court. Combining all the circumstances attendant on it; the solemnity of the occasion, the importance of it to the parties concerned; the respectability of the professors, and the vast assembly; above all, the place chosen for the abominable transaction, a house dedicated to the worship of God—I hardly know how to express my opinion of the character of the transaction. And from what has it arisen? From the contumacious behaviour of Mr. Stevenson. It is not true, as is said of this young gentleman, that the refusal to confer the diploma, degraded him in the eyes of the public, and that therefore an explanation became necessary. How would he have been degraded if he had obeyed the injunction of the professors, and kept off the stage? Who would have observed that the degree was not conferred on him. It is highly improbable, from the manner in which the young gentlemen graduates came on the stage to receive their diplomas, that it would have been noticed, whether he had his diploma given to him or not. But even if he were disgraced, was not his disgrace brought on him by his own act? Was he not told not to appear on the stage, but to come the next day to the college-hall, where the matter would be amicably adjusted? Had Mr. Stevenson submitted to the order of the professors, this disgraceful scene had never happened. And it was his duty to submit, even if wronged: for, in that case, he might have appealed to the trustees; and even from the trustees to the Supreme Court, who, by writ of *mandamus*, would have done him justice; the court, therefore, cannot help declaring Mr. Stevenson's conduct in the highest degree censurable. Nor is Mr. Maxwell's more commendable.—He is a young gentleman of respectable standing at the bar, and of some talents. He was educated, too, in this very college, and by

these very professors, and was, therefore, bound by every principle hitherto deemed sacred among men, to respect the gentlemen to whose assiduities in his earlier days, he is indebted, for the elements of a refined education: and he was bound, also, to revere the institution to which he will owe all the celebrity to which he shall ever attain in life. Viewing all the circumstances relating to the conduct of Mr. Maxwell, the court cannot help pronouncing it an instance of the most consummate hardihood. To rush forward on the stage set apart for the solemnities of the day, and appeal to the audience! Most extraordinary impudence! Appeal to whom? To a mixed assembly of boys and girls, and men and women.—What right had they to exercise an authority over the professors? If they had a right to disapprove—some, then, might approve, and some disapprove. Confusion and disorder, and riot, and disgrace must then have been the consequence. Could such a state of things be endured? As well might you establish a jacobinical club to decide whether the laws of the land should be submitted to.—And the conduct of these men is highly jacobinical.

Mr. Verplank too, must be regarded as one of the ringleaders of this disorder and disgrace. It is difficult to speak in terms sufficiently strong of his highly reprehensible conduct. A young man of his age to have the boldness to mount the stage, and insolently demand of the Provost the causes of his conduct, and then shaping himself of all the importance of an umpire, to exclaim, "*the reasons, Sir, are not satisfactory,*" "*Mr. Maxwell must be supported*" and afterwards to move, that "*the thanks of the meeting be given to Mr. Maxwell, for his spirited defence of an injured man;*" evinces a matchless insolence. And as to Mr. Ferris, a man far advanced in life, and the father of one of the graduates, to be the exciter of a disgraceful and abominable riot, is a subject which could not fail to rouse, in the mind of the court, sentiments of the deepest abhorrence.

There are three other persons concerned in this trial. Their participation of the riot has been clearly proven to you.

It is with the extremest reluctance that we have been compelled to animadvert with severity on the conduct of the defendants in this trial.—They are men whom the court would fain respect. But they have brought this disgrace on themselves, to their own bosoms, for the dishonour which this day shall cast on them.—

Would to God, that this transaction had never taken place!—
 Would to God, that the court had been spared the pain of condemning parties concerned in this riot! But we have our duty to perform—and it shall be performed. We therefore, do not hesitate to declare to you, gentlemen of the jury, that you are bound, not only by every consideration arising out of public peace and the public morals; but, moreover, by your regard for an institution, venerable from its antiquity and its vast utility, to bring in these defendants **GUILTY**.

CIRCUIT COURT OF THE UNITED STATES.

NEW YORK, 1811.

**Schooner Enterprize and cargo, John Yellowly, claimant
 appellant v. The United States libellant, respondent.**

THIS was an appeal from the decision of his honour Judge Tallmadge, in the New York District Court of the United States, condemning the schooner Enterprize and cargo, for having been laden in the night season, without a permit from the collector or the inspection of a revenue officer. The clause of the law under which the condemnation in the District Court had been pronounced is the second section to the third supplement to the Embargo act, and is in the following words:

“ And be it further enacted, that during the continuance of the act laying an embargo on all ships and vessels in the ports and harbours of the United States, and of the several acts supplementary thereto, no ship or vessel of any description whatever, other than those described in the next preceding section, and wherever bound, shall receive a clearance, unless the lading shall be made hereafter under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties and forfeitures, as are provided by law for the inspection of goods,

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wares, and merchandize, imported into the United States, upon which duties are imposed, any law to the contrary notwithstanding; provided that nothing herein contained shall be construed to affect vessels laden in whole or in part, on the receipt of this act by the respective collectors."

From this decree of condemnation an appeal to the Circuit Court of the United States was entered by the claimant; and on Wednesday last the appeal came on to be argued before his honour Judge Livingston, who is now holding the Circuit Court in this city. The cause was argued by Mr. Sanford, the district attorney, on behalf of the United States, and by Mr. Griffin, as counsel for the appellant.

The facts being admitted, the attorney of the United States contended that the penalty for loading in the night season, or even in the day time, without a permit from the collector, was the forfeiture of both vessel and cargo—that although the forfeiture of vessel and cargo was not declared in so many terms by the foregoing section of the supplement to the embargo act, yet that it clearly intended to refer to and adopt certain of the regulations and penalties contained in the collection law, and that the regulations thus referred to and adopted are to be found in the 50th section of that law, which in substance provides that goods, wares, and merchandize imported into the United States from a foreign country shall not be unladen or delivered in the United States but in open day, except by special licence from the collector, nor at any time without a permit from the collector, and punishes every person who may be engaged in the prohibited unloading of such foreign goods, wares, or merchandize, with a forfeiture of four hundred dollars respectively, and a disability to hold any office of trust or profit under the United States for a term not exceeding seven years, and directs the collector of the district to advertise their names in a publick newspaper, and subjects to forfeiture the goods, wares, and merchandize so unladen, and further declares that if the value of such goods, wares or merchandize shall amount to four hundred dollars, the vessel from which they are unladen, with her tackle, apparel, and furniture, shall be subject to the like forfeiture. The attorney of the United States stated that the construction of the law for which he contended, had received the judicial sanction of most of the Dis-

strict Courts in the United States ; that in this district in particular a number of condemnations had been pronounced under circumstances similar to those of this case, in all of which the adverse counsel had acquiesced, except in those where his present opponent was engaged ; that the question now agitated was one of great importance, as by far the major portion of seizures under the embargo laws had been made under this very section. The attorney of the United States concluded his argument by expressing a very confident expectation that the decree of the District Court would be affirmed.

The counsel for the appellant observed that as the cases alleged to have been decided in the other districts of the United States did not come before the court in the definite form of regular reports, it was impossible for him to answer or explain them—that they might or might not have corresponded in all their parts, with the case now in controversy—that this district, as he was well aware, abounded with condemnations under this section of the law ; but that in all those cases where he was engaged, he had entered his protest against their authority by an immediate appeal—that if the other counsel engaged in similar prosecutions had omitted to pursue the same course, he was confident from his knowledge of the sentiments of those gentlemen, that the omission had not arisen from their conviction of the correctness of the condemnation—that their clients, already deprived of their vessels and cargoes, probably of their all, by the rigor of the law, rendered more rigorous by judicial interpretation, might have been unable to find the necessary security for the prosecution of appeals ; or they might have shrunk from a contest where they were threatened not only with the loss of the property in controversy, but also with the most formidable *personal* disabilities and penalties. Under these circumstances, the counsel for the appellant trusted that the cause would come before the court unprejudiced by what had been said to have taken place elsewhere. He was anxious that the question should be fairly met, and decided on its merits. He contended that the only consequence of lading a vessel contrary to the provision of this section of the law was the *refusal of a clearance*—that the subject of a clearance was the thing chiefly in contemplation of the legislature in the sections immediately previous and subsequent, as well as the one in

question—that in this section, there was no absolute prohibition against lading the vessel in any manner which the owner might elect ; but simply a provision that if the lading was not under the inspection of a revenue officer, the vessel should be deprived of the privilege of a clearance—that the construction is harsh and to be avoided, which imputes to the legislature an intention of converting into a *crime*, the exercise of the privilege which every citizen enjoys, of employing his vessel as a store house, or for any purpose not immediately connected with navigation, whenever he pleases, without permission from any revenue officer whatsoever —But that the argument of the opposite counsel not only imputes this intention to the legislature, but also supposes that the legislature intended to attach to this new-created crime, the most severe set of penalties to be found in the whole range of our revenue system ;—and that under this section, if a merchant, from motives of conveniency, and perhaps with no design to depart from the wharf, has the audacity to place a single article on board his vessel without the permission and superintendence of the revenue officers, he is not only liable to enormous penalties and forfeitures, but is also under a seven years' disability to hold any office of trust or profit in his country, and is, in the mean time, to be advertised in the public newspapers as a culprit and outlaw ! That if such an intention indeed possessed the minds of our national legislature, they had not, fortunately for the honour of the country, ventured to express it in clear and intelligible language ;—the despotic mandate had been happily couched in terms of so much darkness and mystery, that our courts were not bound to understand and enforce it.

The counsel for the appellant insisted on the rule of the common law, *that penal statutes are to be construed strictly against the accuser* ; nor was he aware of any privilege which the embargo act and its supplements could reasonably claim to be exempted from the operation of this benevolent and wholesome maxim. But if any forfeitures, over and above the penalty of being refused a clearance, are created by this section, what are those forfeitures ? and from what part or parts of the collection law are they to be taken ? That the answer of the attorney of the United States on this subject, ought to have been very explicit and satisfactory ; for although it be admitted that a penal

statute may, by reference, incorporate and adopt the penalties and forfeitures of some other penal law, yet that the terms of such reference and adoption should be exceedingly clear and unequivocal. That the attorney of the United States had referred to the 50th section of the collection law, as containing the restrictions, regulations, penalties, and forfeitures intended to be adopted by the clause of the embargo law now in question. But that it would be borne in recollection that the clause now in question speaks of such restrictions, regulations, penalties and forfeitures "as are provided by law for the *inspection* of goods, wares and merchandize imported into the United States," and that it will be found on examination, that the 50th section of the collection law treats, not of the "*inspection*" of goods, wares and merchandize, but of their unlading and delivery; and that neither the word "*inspection*" nor any other word of corresponding import, is to be found throughout the whole section; nor could the counsel for the appellant discover the semblance of a reason why the 50th section of the collection law was thus endeavoured to be pressed into the service of the embargo act and its supplement, except that there was no other part of the collection law which could be tortured into a bearing on the subject, and except also that the 50th section of that law is more rigorous in its penalties and denunciations than any other portion of our ancient revenue system. The counsel for the appellant concluded by observing that the language of the legislature is involved in such obscurity as at least to leave room for *doubt*; and that in the construction of criminal or penal laws, doubt should be tantamount to acquittal.

His honour, the Judge, after holding the cause under advisement for several days, delivered a very luminous and able opinion, in which he took an extended view of the subject, declaring it to be very questionable whether the legislature intended to attach to vessels lading otherwise than in the prescribed manner, any penalty except that of being refused a clearance; but that if it was indeed the intention of the legislature to superadd other penalties and forfeitures, they had not adopted that clearness of phraseology which would authorize the court, consistently, with the established rules which are to govern the construction of penal statutes, to carry such intention into effect. The judgment of the District Court was therefore reversed.

OF THE LAWS OF CONNECTICUT.

THE following Report of a committee on the subject of the Laws of Connecticut, was transmitted to the Editor by his friend Mr. Day, a gentleman, who has long been known to the profession, with great advantage to himself, as an accurate reporter and a faithful commentator. It were to be wished that the other states would evince the same attention to their laws, which has distinguished the Legislature of Connecticut. It is far from an extravagant computation, to say, that there are upwards of two thousand persons annually employed in the United States in the task of enacting statutes, which require half of the time of their successors to amend or abolish. In Maryland the various laws relative to the estates of deceased persons had become so numerous, complicated and contradictory, and indeed exhibited such a *rudis indigestaque moles* that a gentleman was employed by the legislature, to draw them into something like a regular system. Yet our testimonial system is still in such a state of confusion, that none but those practitioners who have learned knowledge by long experience and acquired confidence by age, will venture to hazard an opinion upon it. Surely such evils require a remedy. The laws are not made for the lawyers but for the people.

Besides the perplexities arising from obscure laws and emendatory supplements, we are annually perplexed with a vile mass of trash of a local and temporary nature. Sometimes the whim of some fool is to be gratified by a legislative permission to change his name, a termagant vixen is to be separated from a sottish husband, or a fraudulent bankrupt is to be covered by a national mantle from the just resentment of a deceived creditor. In this manner our laws are multiplied to such a bulk as to be an enormous tax upon the lawyers, and a "blind guide" to the client, who *beats his deer at the crowing of the cock*, to ask for an opinion.

A digest of the acts of assembly of this state has recently been published by Mr. Maxcy, in a cheap and portable form, which we believe is faithful and sufficiently comprehensive for all practical purposes. It will be continued by the editor of this journal and delivered to its patrons, *free of expense*, in the form of supplements. The same thing has been done in Pennsylvania by Mr. Purdon, in a manner which reflects great credit on his industry, fidelity and learning. There is also a digest of the laws of Massachusetts, but we have not seen it.

THE LAWS OF CONNECTICUT.

CONNECTICUT, from the establishment of her government, has been politically happy. She has been distinguished, in this respect, from almost every nation on the globe. There is, moreover, a trait of national character, for which she has been equally distinguished. We allude to the unparalleled caution, with which

her rulers have proceeded, in the passing of new laws, and the adoption of new measures. That the former has regularly resulted from the latter, is a truth, of which those who form opinions, by examining facts, can have little doubt.

Experimental philosophy had been taught, and recommended by Lord Bacon, before the emigration of our ancestors. Adopting the same mode of reasoning, they applied it steadily, and successfully to legal polity. They seldom took a step in legislation, till experience had evinced its necessity. They then provided for the immediate exigency, but for nothing more. Hence, our system of jurisprudence has, in a very strict sense, grown with the growth of our country.

The caution of our primitive legislators resulted neither from incapacity to devise, nor want of courage to execute. Ludlow, Haynes, Hopkins, and Henry Wolcott were not weak nor timid men.

Though two former colonies are united in this state, we are indebted to but one government for our laws. New Haven, at the union, brought a rich portion into the political family; but with her name, she relinquished her system of jurisprudence. So entire was the relinquishment, that not a single statute provision was retained. To this conclusion we were led, in the first instance, partly by some examination of the New Haven records, and partly by our success in tracing the several acts, which were afterwards in force, to a different origin. We have since been informed, by the venerable historian of Connecticut, that such also was the result of his researches.

Connecticut was originally a colony of Massachusetts. In May, 1634, the people of Cambridge, Dorchester, and Watertown, applied to the General Court, for permission to remove, and effect a new settlement. There being, at that time, considerable opposition, the application failed of success; but on renewing it, the next year, they obtained permission to remove whithersoever they chose, subject to this restriction, that they should continue under the jurisdiction of Massachusetts. Many of them having accordingly removed, in the summer and autumn of 1635, and settled at Hartford; Windsor and Wethersfield, undeniably without the territorial limits of Massachusetts, and too remote to be under her immediate government, the

General Court, on the third of March, 1636, granted a commission for one year, to Roger Ludlow, Esquire, and seven others, investing them with legislative and judicial powers in the new plantations, and authorizing them to convene the inhabitants, if necessary, to exercise those powers in General Court. It does not appear, however, that the inhabitants, during the year, were convened for that purpose. The persons named in the commission met at Hartford, on the 26th of April following, as a court of magistrates, and proceeded, at that and subsequent sessions, to provide for the public safety, requiring each town to keep a watch, and the inhabitants to be trained to military exercise, supplied with arms and ammunition, and kept in a posture of defence; to settle the boundaries of towns; to qualify municipal officers; to determine suits at law, by jury, or otherwise; to enforce the specifick execution of agreements; and to exercise prerogative powers over the estates of persons deceased. The commission expired by its own limitation, and was never renewed; nor did Massachusetts assert any further claim of jurisdiction.

The government, of course, came into the hands of the people. Such was their confidence in the men, who had been their legislators and judges, under the commission, that they continued them, with few changes, in the exercise of the same duties, and invested them with the same authority. At the next court, which was styled a General Court, held on the 1st of May, 1637, deputies from the several towns were associated with the magistrates; but, at that period, the former were not necessarily a constituent part of the court, and attended only on important occasions.*

* The following account of the earliest period of our government, is given by Dr. Trumbull in his history, and copied by Judge Marshall into the introduction to his *Life of Washington*: "All the powers of government, for nearly three years, seem to have been in the magistrates, of whom two were appointed in each town. These gave all orders, and directed all the affairs of the plantation. The freemen appear to have had no voice in making the laws, or in any part of the government, except in some instances of general or uncommon concern. In these instances, committees were sent from the several towns. During this term, it seems, that juries were not employed in any case." As our account is a very different one, a due respect to the high authority to which it is opposed, requires us to state the evidence, on which we have taken it ourselves, and now give it to the public. The commission, copied from the records of Massachusetts, is contained in *Hazard's Historical Collection*, vol. i, p. 331. It bears date, on the

On the 14th of January, 1639, all the free planters assembled, and adopted, for themselves and their posterity, a constitution, conformable in its principles to the frame of government already begun, and differing from it chiefly in its greater extension, and its adaptedness to an increased and increasing population.

In October following, the General Court appointed a committee to revise the laws. It consisted of Mr. Wyllys, afterwards governor of the colony, Mr. Wells, for many years a magistrate, and Mr. Spencer, an intelligent deputy from Hartford. They were required to transcribe such as they deemed conducive to the publick good, and deliver them to the secretary to be published to the several towns; and such as they should think proper to omit, were to be suspended until the further order of the court. At the same session it was provided, that the constables should, within a limited time, cause the publick statutes then in force, and afterwards those of each session, as they should be passed, to be kept for the town's use. And in order to render the publication of the laws as complete as possible, without the aid of printing, the constables were required to read them, once a year, in some publick meeting.

In April, 1646, Mr Ludlow was requested to compile "a body of laws" for the commonwealth, and present it to the next Gene-

ral of it, March 3, 1635; which, as the framers of that instrument, in the computation of time, began their year on the 25th of March, was a year earlier than those terms would now denote. The persons named in the commission were Roger Ludlow, Esquire, William Pynecheon, Esquire, John Steele, William Swaine, Henry Smith, William Phelps, William Westwood, and Andrew Ward. The evidence that these men acted under the commission, for one year, is derived from the records of the colony. It is summarily this—That within eight weeks from the date of the commission, and at seven different times afterwards, a court was held in the Connecticut plantations: that it was, at each time, composed of a majority of these men, and of no others; that their names are arranged on the records, precisely in the order in which they appear in the commission; and that their proceedings were conformable to the powers with which the commission invested them. That after the lapse of one year, the government was changed, is inferred from the express limitation of the commission, and the total silence of historical documents as to its having been renewed; from the accession of new members to the court; and from the attendance of deputies [called committees] from the several towns. That juries were in use, even during the first year, is proved by the record of one action, in which the jury gave a verdict; of another, in which a juror was withdrawn by consent; and by a legislative act, providing a specifick compensation to each juror, for every action committed to them.

ral Court. This work not being completed in May, 1647, the request was then repeated, and a compensation offered in addition to what had been at first proposed. Such, however, was the weight and difficulty of the undertaking, requiring time for reflection, and opportunity for research, that its accomplishment was protracted until the spring of 1650.* We find no formal ratification of it by the General Court; but it was at that time, copied by the secretary, into the book of publick records, and is frequently referred to, in subsequent statutes. It comprised, besides a complete collection of our own laws then in force, many provisions borrowed from Massachusetts, which seemed necessary to perfect the system, and which the experience of a people in corresponding circumstances, had proved to be salutary. It was divided, like the books of the Justinianean code, into titles and laws. The titles, of which there were seventy-four, were arranged in alphabetical order.

In 1662 the constitution of 1639, was superseded by the charter of *Charles the second*. The latter, having been procured on the application of the General Court, was, on the 9th of October, submitted to the freemen, convened at a general election; who, on the same day, manifested their reception of it, by choosing a committee to take it into their custody, in behalf of the freemen. The legislature, organized under this instrument, thus adopted, proceeded to establish all the former officers, civil and military, in their former offices; and to declare all the laws of the colony, not contrary to the tenour of the charter, to be in full force and virtue. The charter included New Haven; but that colony did not unite with Connecticut under it, until May, 1665.

In consequence of the union, a more perfect promulgation of the laws became necessary. Manuscript copies of the acts of

* The date assigned by Dr. Trumbull, is May session, 1649. But this is manifestly too early; for an act passed in September, 1649, is included in the body of the code. At a session of the General Court, on the 20th of March, 1650, an act of some importance, which had been passed a few years before, was repealed; and that act is omitted in the code; the inference from which is, that the compilation was not then completed. But, that it was completed before the end of the May session following, is equally evident; because an act of that session, instead of appearing, under its appropriate title, in the code, is placed after it, and is immediately followed by other acts of a later date, arranged in chronological order.

each session of the General Court had been regularly transmitted to the several towns within the former limits of Connecticut, and publicly read to the inhabitants; but the new members of the community had enjoyed no such means of information. The design of procuring an edition of the statutes to be printed was formed; but, as many new ones had been passed, and many old ones had been repealed, had expired, or become obsolete, since the compilation of the code, it was deemed expedient to make, in the first place, a general revision. In May, 1671, a committee, consisting of the governour, the deputy-governour, and a majority of the assistants, were appointed to revise the laws, to arrange them, and, with the assistance of the secretary, to prepare a draught to be laid before the General Court, at a future session, for their confirmation. The committee entered upon the business of their appointment; and during their progress, received occasional instructions from the General Court. In October, 1672, the revised draught was presented, approved, and ordered to be printed.—The division and arrangement of the code of 1650 were preserved, the new titles, of which there were about seventy, being inserted in their appropriate places. The seal of the colony, and a preface written by the committee, in pursuance of a special resolve of the General Court, were prefixed to the statutes, and an index subjoined. In the course of the following year an edition was printed at Cambridge, in Massachusetts, by Samuel Green, the first printer in North America. Samuel Wylls, and James Richards, Esquires, were appointed to inspect the impression, with instructions to compare it with the original, and to see that it should be made correct. The constables were then ordered to distribute the copies in their respective towns, it being made, by law, the duty of every family to purchase a copy. The revised statutes were to take effect from the last of December, 1673.

During the administration of Sir Edmund Andross, which began, in Connecticut, on the 31st of October, 1687, and ended on the 9th of May, 1689, the former government and laws suffered a suspension; but on the day last mentioned, both were re-established by the consent of a majority of the freemen, assembled for that end.

After the revision of 1672, manuscript copies of the acts of each session were transmitted to the several towns, as before; and

were generally inserted at the end of the printed code. By these constant accessions, the statute-book, near the close of the seventeenth century, had become extended to nearly double its original size. Statutes relating to the same subject were scattered over the book, part in print, and part in manuscript, part in force, and part repealed or expired. To remedy this inconvenience, and to improve the system, a general revision was proposed. In 1696, John Allyn, James Fitch, and Eleazer Kimberly, Esquires, the two former being, at that time, assistants, and the latter secretary, were accordingly appointed a committee to revise all the laws of the colony, and to consider what alterations and additions were necessary to render them more effectual in maintaining righteousness, and promoting the weal and prosperity of the people. At the next session, the general assembly requested the reverend clergymen of Hartford to assist the committee by their advice. The revision appears to have been completed before the session of the general assembly in October, 1700; when it was provided, that an edition of fifteen hundred copies should be printed at Hartford, under the seal of the colony, as soon as practicable; and that the charter, which had been omitted in the former edition, should, in this, be prefixed to the statutes. As yet, however, there was no printer in the colony; and the attempt to procure one, for this special purpose, proved unsuccessful. For this and other weighty reasons, the printing was delayed until the summer of 1702, when it was executed at Boston. The legislature, at their session in October following, provided for the distribution of the copies; and enacted, that the revised statutes should take effect from the first of December following.

So general was the use of the statute-book, at this period of our history, that within thirteen years, it was found expedient to publish another edition. In October, 1714, the honourable governor and council were authorized to collect the statutes then in force, and cause them to be printed, as soon as practicable. The number of copies was to be such, that there should be *five* to every *thousand pounds* in the general list. These were all to be distributed to the several towns in proportion to their respective lists. *Timothy Green*, a descendant of the printer of the first edition, who had settled at New London, and was, for many years, printer to the governor and company, was employed to

execute the work. This edition was only a copy of the preceding one, with the additional acts.

The next edition was published in 1750 ; previous to which there was a general revision of the statutes. Like the former ones, it was the work of several years. The committee were appointed in October, 1742. It consisted of the honourable Roger Wolcott, Thomas Fitch, Jonathan Trumbull, and John Bulkley, Esquires ; the three former of whom were successively governors of the colony, and the latter a judge of the Superior Court. They were invested with the usual powers of such a committee, except as to acts relating to real estate ; in which they were instructed to take care, that no alteration should be made. In accomplishing the object of their appointment, Governour Fitch had the principal efficiency.

In 1769, another edition was published, differing from that of 1750 only as it contained the additional acts, subjoined in chronological order.

After our separation from Great Britain, and the change of our condition from a colony to a state, a general revision became indispensable. In May, 1783, Roger Sherman and Richard Law, Esquires, both, at that time, judges of the Superiour Court, were appointed a committee, with instructions to digest all the statutes relating to the same subject in one ; to reduce the whole to a regular code, in alphabetical order, with such alterations, additions, exclusions, and amendments, as they should judge expedient ; and to lay the same before the general assembly. In January, 1784, there was an adjourned session for the special purpose of considering and acting upon a draught of the code as revised by the committee. The whole underwent a careful examination, and many parts a full and able discussion ; amendments were proposed, and adopted or rejected, as the wisdom of the legislature directed ; and at length a code was established, which, as an act at the end declared ; contained all the statute laws of the state. Such as were left out of that code were, by the act alluded to, expressly repealed. An edition was immediately afterwards published, under the inspection of Judge Law.

Thus far, every edition of the statutes had been printed in *folio*. In 1786, an edition was printed at Hartford in *octavo*. No other improvement was attempted.

In 1795, the statutes were again revised. The committee, consisting of the honourable Chauncey Goodrich and Jonathan Brace, associated with one of the undersigned, were appointed in May, and directed to make their report in October. The principal duty assigned them was to *compile* and *expunge*. In discharging this duty, they limited the compilation, in most instances, to such acts of publick policy and arrangement as had, by successive editions and alterations, become numerous, disjointed, and complex; acts relative to the institution and organization of courts; to the powers and duties of corporate bodies; to publick officers; to crimes; and others of a like description. Such as related to real estate, process, rules of practice in courts and others belonging to this class, were generally left untouched. These, they apprehended, when printed in the order of their connexion, would not be found complicated. The acts and parts of acts which they proposed to expunge were such as had been expressly repealed by other statutes, such as had expired, or had otherwise become obsolete, and such as were superseded by the constitution, or laws of the United States, or by other provisions of our own statutes. Whenever sums of money were specified, the denomination was changed to that of the United States. The report of the committee was fully considered by the legislature, and established, with a few variations, as the basis of the revised code. As the reduction of money from one denomination to another produced a number of minute fractions, a general rule was adopted, by which they were cut off. In the course of the next year, a neat octavo edition was printed by Hudson and Goodwin, under the superintendence of Mr. Brace, and two of the undersigned.

At the session of the general assembly, in May, 1807, the following resolution was passed:

“ It being proposed by Messrs. Hudson and Goodwin, printers in Hartford, to publish an edition of the statutes of the state of Connecticut, under the superintendence of such persons as the general assembly shall appoint:

“ Resolved by this assembly, that his honour John Treadwell, Enoch Perkins, and Thomas Day, Esquires, be, and hereby are appointed to superintend the printing of said statute-book, and to take care that the impression be true and correct; the proposed

edition to contain the charter of Connecticut, the constitution of the United States, and the statutes of the state, placed in their alphabetical order, omitting those repealed, which, in the opinion of the persons above named, are not necessary to be retained; and there shall be inserted notes or memorandums of the times when the statutes and particular paragraphs thereof were enacted, with marginal notes of their contents, so far as can conveniently be done; and also, prefixed to the book, a comprehensive index of its contents."

In pursuance of this appointment, we entered upon its duties, yielding a liberal construction to the terms in which those duties were enjoined.

To establish the basis of a perspicuous and permanent mode of reference, we divided this *first book* of our statute laws into *titles, chapters, and sections*. The future acts may commence, and eventually complete, a *second book*. As these must be arranged in chronological order, they may be advantageously divided into *sessions, chapters, and sections*.

Before the work went to press, the copy to be printed from was carefully inspected, and the typographical errors corrected. Where there was any room for doubt, it was collated with the records.

In examining the records, we observed some entire statutes, passed since the revision in 1784, and remaining in force, which had never been printed. These have been brought forward, and embodied in the present code.

The acts, which have been wholly repealed, or have wholly expired, with the exception of a few retained in notes, are omitted in this compilation; but we were not authorized to expunge sections, or clauses, of acts, of which any part remained in force. We have not, however, left those parts, which have ceased to be in force, without plain marks of distinction. They are inclosed in brackets; printed in a smaller character; and denoted as repealed, expired, or altered, by words to that effect in the side margin.

Whenever the provisions of one act are affected by another, a reference to the latter has been inserted in the side margin of the former.

Side-notes, where they were wanting, have been supplied; and the old ones, where they were imperfect, or erroneous, have been extended, or corrected.

Some obsolete terms have been explained in marginal notes.

We have prefixed an index to the work, which we deem sufficiently comprehensive. It contains more than six thousand abstracts, made from a perusal, for the sole purpose, of every sentence of the text, and so disposed, according to a system of arrangement and reference, that each may be readily found.

In executing the chronological notes, we found many difficulties to encounter. The publick acts of nearly two centuries were to be examined and compared. For this purpose, records, written in an obsolete character, not unfrequently torn and defaced, always without method, and without an index, were to be searched. The whole progress of legislation was to be traced. The alteration of old laws, no less than the introduction of new ones, was to be observed. Provisions adopted in the infancy of our government, originally arranged under titles in no degree appropriate, and transferred, at subsequent revisions, from act to act, sometimes varied in substance, and sometimes modified only to help the connexion, were to be sought for among the regulations of a distant period, and an advanced state of society. But these were difficulties, which might be overcome by labour; and from no labour were we disposed to shrink, which the legislature had enjoined, and the public convenience seemed to require. We are not aware of having left an act, a section, nor often a provision, unaccompanied by its correct date. Still there may be omissions, which more fortunate diligence would have supplied, and errors, which a nicer discernment would have avoided.

JOHN TREADWELL,
ENOCH PERKINS,
THOMAS DAY.

30th November, 1808.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA DISTRICT,

October Sessions, 1841.

M'Fadon & Greetham v. Schooner Exchange.

An armed vessel of war, called *The Balaou*, No. 5, sailing under the flag of Napoleon, Emperour of France and King of Italy, commanded by the *Sieur Bigon*, under a commission from and said to belong to that emperour, and to be in his actual service, arrived in the port of Philadelphia, in the month of ———, last. Shortly after her arrival, she was arrested by process from the District Court of the United States, upon a libel filed by the plaintiffs, the substance of which is stated in the opinion of the court. No claim was put in by or on behalf of any person, but the attorney of the United States for this district, by orders from the executive department of the government, filed a suggestion, which also appears in the opinion of the court, the effect of which was to stay further proceedings on the merits, and to submit to the court the question, whether it had jurisdiction of the cause, so as to proceed at all into an investigation of the case. The question, therefore, before the court, was not upon the merits, and whether the vessel belonged to the libellants or to the emperour, but whether the court had a right to investigate the matter at all, and to say to whom she belonged. The opinion of the district judge was against the jurisdiction, from which opinion the libellants appealed to the Circuit Court. The cause was here argued by *Hopkinson* and *Binney*, for the libellants, in support of the jurisdiction, and by *Dallas*, district attorney, against it.

After holding the case some days under advisement, the following opinion was delivered :

No. XIV.

I

WASHINGTON, J.—This is an appeal from the District Court, in a case of admiralty and maritime jurisdiction. The libel states, that the schooner which constitutes the subject of the suit, called *The Exchange*, was, on the 27th of October, 1809, the property of the libellants, and was duly registered in their names; that in the same month and year she was fitted out by the libellants, and sailed on a voyage to St. Sebastians, in Spain, and was, in December following, forcibly seized under certain acts of the emperor of France, and without the sanction of any sentence of condemnation, disposed of in violation of the rights of the libellants and of the law of nations;—that the libellants have never transferred their right to the said vessel, and that she is now within the territory and jurisdiction of the United States and the jurisdiction of the court.

To this libel an objection was filed by A. J. Dallas, district attorney of the United States, for this district, setting forth that this vessel, which in the suggestion is called *The Balaou*, No. 5, belonging to the emperor of France, and King of Italy, and actually employed in his service, under the command of the *Sieur Bigon*, upon a voyage from Europe to the Indies, having encountered great stress of weather, had been compelled to enter the port of Philadelphia for repairs, and having conformed to the laws of nations and the United States, was about to depart, when she was arrested by the process of the District Court. The suggestion then denies that this vessel had been violently captured from the libellants on the high seas as prize, or otherwise, but asserts that she was seized and the property in her was devested out of the libellants (if they ever had any in her) and vested in his imperial and royal majesty, in a port of his empire, according to the laws of France. Upon the suggestion of these facts, it is then submitted, whether the court ought to take cognizance of the cause. The replication after excepting to the suggestion as not being made by any person claiming the said vessel, supports the allegation of the libel and negatives those set forth in the suggestion.

An objection is made to the mode of proceeding in this case. It is contended that no person ought to be admitted to contest the right of the libellants, or to interpose in any manner to prevent a decision upon their rights, but one who claims the property either for himself, or on behalf of some other, and that the district

attorney has not stated in his suggestion that he claims, or even appears for himself, for the United States, for the French emperor, or for any other person.

I understand from the opinion and decree of the judge of the District Court, that the district attorney, when he filed the suggestion, stated, that he did so at the request of the executive department of the general government, to whom an application and representation had been made by the French minister, containing a protest and denial of the allegations of the libel; and further that the suggestion in this case is substantially agreeable to the form usually practised upon, when the executive department thinks it incumbent on it to give information through the law-officer of the district, to that court, of any matters subject to its judicial cognizance, which come to the knowledge of the executive in the course of its communications with foreign powers or their agents.—I do not feel disposed to disturb this practice, being of opinion that the department of our government charged with the care of our foreign relations, should be admitted in some way or other to give such information upon subjects which concern the peace of the nation, or which the executive deems essential for the publick good to communicate in this way. The proceeding would certainly have been more regular if the reason of filing the suggestion had been stated on the face of it, as the court would certainly not listen to the impertinent and officious suggestions of any person who might think proper to interfere. But the responsible character attached to the publick law-officers of the United States' courts, forbids the supposition that they act without authority when they declare the contrary to the court.

In other countries, communications from the government to the Courts of Admiralty, are generally made in the form and with the effect of mandates, which the judge finds himself compelled to obey. Such is not the present condition of any court in the United States, and I trust never will be. If a legal objection to the jurisdiction of the court appears on the face of the record, it will not be denied but that the district attorney, or any other person as an *amicus curiæ* may properly point it out.—But if the objection arises from facts not so appearing, the district attorney, thus intrusted to file a suggestion, must establish the facts by proof, in the same manner as in ordinary cases between private

individuals. Accordingly, that officer in the present case proceeded to support the allegations of the suggestion by exhibiting the commission of the officer commanding this vessel, granted by the emperor of France, authenticated by the depositions of the commander himself, and of the French vice-consul.

The evidence has been objected to by the appellant's counsel. It is said that the officer found in possession of the vessel ought not to be admitted by his own evidence to justify and maintain that possession, and that the testimony of neither of the witnesses ought to be regarded, because the libellants were denied the privilege of cross-examining them. The objection to the competency of the *Sieur Bigon* is certainly not a good one, since he claims no interest whatever in the vessel, and no circumstance has appeared to bring his credit into question. There can be no doubt of the right of the libellants to cross-examine these witnesses, and I must presume (even if the presumption were not supported by the declaration of the district judge) that the privilege of cross-examining was not denied by the court; because if it had been, an exception would certainly have been taken to the opinion. But if an error of this sort had been committed by that court, it might have been repaired at the trial in this court; yet no attempt was made to examine these or any other witnesses.

The facts which I consider as proved by the evidence in the cause are, that this vessel, called in the libel *The Exchange*, is a publick armed vessel, claimed by the emperor of France, in the possession of an officer duly commissioned by the emperor, sailing under the flag of that nation, and now lying in the port of Philadelphia, and the question of law is: Whether the District Court of the United States, for this district, can take cognizance of a libel filed in that court against this vessel, on the part of the original owner, who has never by any act of his, parted with his right to her? The case is highly important, and has been argued with great ability on both sides.

The general rule of the law of nations, laid down by the counsel for the appellant, is: That whatever goods and effects lie within the extent of a country, or are found there, whether moveable or immoveable, are subject to the authority and jurisdiction of the courts of that country. The rule, as a general one, is admitted. It is certainly supported by the most respectable au-

thority, and is contradicted by none. But it is contended on the other side, that a publick armed vessel, belonging to a foreign prince, which has committed no offence within the jurisdiction of the country where she is found, forms an exception to the rule. This exception is not to be discovered in the writings of any jurist, foreign or domestick, nor does it appear to be founded in the practice of nations, so far as is recollected by the court, or has appeared from the researches of the bar. *Bynkershoek* (who has been roughly handled by the counsel on one side, and highly eulogized on the other, but whom all must admit to be a respectable writer on the laws of nations) in stating the general rule, and for the purpose of negating an exception to, or on account of any supposed privilege which sovereigns might claim, lays it down in the clearest terms, that the goods and effects of a sovereign, whilst they are within a foreign territory, are subject to the laws of that country, and to the jurisdiction of its courts. He considers the privilege of the sovereign to be exempted from the jurisdiction of a foreign tribunal, to be merely personal, and not extending to his goods found there.—He proceeds to support this doctrine by the practice of the courts of Holland, at that time amongst the most respectable nations of Europe.—It is true that in many of the cases which he cites, the government arrested the proceedings; but this only proves that such interference was deemed necessary for reasons of state, to prevent the exercise of jurisdiction by the judicial tribunals, which otherwise would have proceeded in its regular and acknowledged channel. It is said that this authour, in his efforts to regulate an exception in favor of a foreign prince, is not supported by any other elementary writer, or by a usage founded on the practice of nations. The answer given to this observation is, I think, a fair one. The doctrine is consistent with the general rule, and has for near a century been pronounced, by this author, as forming a part of the law and practice of nations, and is denied by no writer of respectability, nor by any evidence of a contrary usage. But it is not true that this position has not received the sanction of more modern writers on the law of nations. *Rutherford* is express. He says “that the right of territory extends the authority of such laws to all questions which relate to the use, or private ownership of such moveable goods as are within the territory of the

nation, and of such immoveable goods as are confessedly a part of its territory ; whether its own members only are concerned in these questions or the *collective bodies*, or the individual members, of other nations." In other parts of this chapter he explains the term "collective body of the nation" to mean the nation itself, or the sovereign power.

But it is still contended that though the exemption of the sovereign from the foreign jurisdiction in relation to his private effects may be denied by these authorities, still *the publick armed vessels* of the same sovereign stand upon different ground, and that their exemption is not controverted by those writers. It is true, that except in some of the cases stated by *Bynkershoek*, where publick armed vessels were arrested, this distinction between the publick armed vessels and the private property of the sovereign is not noticed. The general expressions of these jurists embrace both publick and private vessels, and if the former are entitled to exception, those who contend for the exception are bound to prove it supported either by authority, or by strong and unquestionable reasons. How then does this question stand on the ground of reason? What is there in the character of a public armed vessel to withdraw her from the jurisdiction of a foreign court? It is admitted, and such indubitably is the law, that if such a vessel should, within the foreign jurisdiction, do any act which would expose a private vessel to forfeiture, she would not be protected on account of her publick character.—Why would she not be protected?—The answer given by the counsel who endeavours to maintain the exception, and yet who is compelled to admit this qualification of it, is because the offence is committed within the *foreign jurisdiction*. Then it follows, that the reason for the exemption is not founded on *the character of the vessel*, but on *the place* where the offence was committed, because the same reason equally applies to a private vessel of the sovereign or of an individual ; and if a private vessel would be forfeited, because the offence which produces the forfeiture was committed within the jurisdiction, and would not be forfeited if it were committed elsewhere, and a publick armed vessel would equally be forfeited or not, for the same reason, I should like to know what becomes of the distinction which is attempted between the one vessel and the other?—It is true that offences are in their nature local, unless

rendered otherwise by express statute ; but if that statute makes no distinction between publick armed and private vessels, the locality of the offence would no more protect the one than the other from the jurisdiction of the foreign courts, both being found within the territory of that nation.

How is it with respect to contracts ? It is admitted that the property of a sovereign, found within a foreign territory, is as much subject to the jurisdiction of the courts of that country, in a matter of contract, as if it had belonged to a private individual. The goods of a sovereign, found within a foreign territory, may be made liable for liens to which the laws of that country subject them ; and I presume it will scarcely be denied that for repairs done in this state to a publick armed vessel of a foreign prince, she may be proceeded against in the admiralty, by the ship-carpenters and material-men in the same manner as if she were a merchant-vessel. The reason of this cannot be because the repairs were made within this state, because contracts are, in their nature transitory. If, then, publick armed vessels no less than the private property, moveable or immoveable, of a foreign prince, being within the territories of a foreign country, are subject to the jurisdiction of its courts, not only to answer for offences, but in matter of contract, it would seem to follow that the distinction which has been attempted between the publick armed vessels and the private armed vessels of a foreign prince, is entirely fanciful.

It was said, that to lay the arm of the law upon a publick armed vessel of a foreign prince, is an act of hostility. If so, then, the admitted cases where such a vessel may be arrested and subjected to a judicial sentence, cannot be well founded in law ; for it never can be allowed to courts of justice to commit acts of hostility against foreign nations. This power, in all countries, belongs to some other department of the government, and although the acts of a court may sometimes be the remote cause of a war, just or unjust, on the part of a foreign nation, yet a power to commit a direct act of hostility, can never be properly lodged with that department.

If, then, the exemption of a foreign prince from the jurisdiction of the courts of a country within whose territories his property is found, is not to be maintained on the ground of his personal privileges, the character of his property, or the locality of

the transaction which becomes the subject of judicial inquiry, I am at a loss for a solid ground for excluding the present case from the jurisdiction of the District Court.

I am fully sensible of the delicate nature of the question which is here decided, and I feel cheered by reflecting that the error of my judgment, if I have committed one, can and will be corrected by a superiour tribunal: for surely a question of such national importance as this is, ought not, and I hope will not rest upon the decision of this court. I can, at the same time, truly declare, that if I could be so wicked as to decide this case different from the opinion which I must sincerely entertain respecting it, my humble genius and talents would not enable me to give one single reason which my conscience or judgment could approve.

It is therefore adjudged, ordered and decreed: that the decision of the District Court be reversed, and that the decree be remitted to the D. C. for further proceedings.

From this sentence of reversal the district attorney appealed to the Supreme Court of the United States, where the cause was fully and ably argued.

On the 2d of March, 1812, the opinion of the court, (all the judges being present) was delivered as follows:

MARSHALL, Ch. J.—This case involves the very delicate and important inquiry, whether an American citizen can assert in an American court a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles of the national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation, as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereign-

ty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction ; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may in some instances be tested by common usage and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another ; and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will extend to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse,

and an interchange of good offices with one another, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and licence of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation, and it is to avoid this subjection that the licence has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed, to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign whose dominions he had entered, it would seem to be because impliedly all sovereigns implicitly engage not to avail themselves of a power over their equals which a romantick confidence in their magnanimity has placed in their hands.

2d. A second case standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the juris-

diction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

The consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But, the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereigns to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the consideration that, without such exemption, every sovereign would hazard his own dignity by employing a publick minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the object of his mission. A sovereign committing the interest of his nation with a foreign power to the care of a person whom he has elected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, when he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdic-

tion over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiving of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and would often be imminently dangerous to the sovereign through whose dominions it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubt-

ed, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of a sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its irregular and improper conduct. It may well, however, be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule therefore with respect to this species of military force has been generally adopted.—If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If, there be no prohibition, the ports of a friendly nation are considered as open to the publick ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect, in favour of vessels driven in by stress of weather or other urgent necessities. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to let vessels in distress find a refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the publick ships of foreign friendly powers, the conclusion seems irresistible that they enter by his assent. And

if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing this case from that of vessels which enter by express assent.

In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what has been implied has been found equal to the obligation of that which was expressed. Are these reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged but which the court will not attempt to escape.

Those treaties which provide for the admission and safe departure of publick vessels entering a port from stress of weather or other urgent cause, provide in like manner for the private vessels of the nation; and where publick vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant-vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule and same principle is applicable to publick and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favour of ships of war?

It is by no means conceded that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade would become amenable to the local jurisdiction unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favour of distressed vessels as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted that the whole reasoning upon which such exemption has been implied

on other cases, applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument which completely establishes the independency of a publick minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the princes a tacit convention which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the court it appears that where, without treaty, the ports of a nation are open to the private and publick ships of a friendly power, whose subjects have also liberty without special license to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to publick armed ships which constitute a part of the military force of the nation.

The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant-vessels enter for the purpose of trade, it would be obviously

inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary or local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license therefore under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a publick armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the publick armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and main-

tains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern.

The only applicable case cited by Bynkershoek is that of the Spanish ships of war seized in Flushing for a debt due from the king of Spain. In that case the states general interposed; and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince by seizing the armed vessel of the nation. That this proceeding was once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem a feeble argument in support of the universality of the opinion in favour of the exception claimed for ships of war. The distinction made in our own laws between publick and private ships would appear to proceed from the same opinion.

It seems then to the court to be a principle of publick law that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him a right to claim that proper-

ty in the court of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favour of this opinion which have been drawn from the general inability of the judicial power, to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are diplomattick rather than legal discussions, are of great weight and merit serious attention. But the argument has already been drawn to a length which forbids a particular examination of these points.

The principles which have been stated will now be applied to the case at bar.

In the present state of the evidence and proceedings, The Exchange must be considered as a vessel which was the property of the libellants, whose claim is repelled by the fact that she is now a national vessel commissioned by, and in the service of, the emperour of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title by which the emperour holds this vessel. Every person, it is alledged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in these courts, unless there is some law taking his case out of the general rule. It is therefore said to be the right and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act the validity of which is recognized by national and municipal law.

If the preceding reasoning be correct, The Exchange, being a publick armed ship in the service of a foreign sovereign with whom the government of the United States is at peace, and having entered an American port open for her reception on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that while necessarily within and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting, that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the sentence of the Circuit Court, reversing the sentence of the District Court in the case of *The Exchange* be reversed, and that of the District Court dismissing the libel be affirmed.

An Act to regulate Attachments in the State of Georgia.

Whereas, it is just and proper that provision should be made for the recovery of debts, where the same cannot be done by the ordinary process of law.—Therefore,

Be it enacted, &c. That in case of nonresidence, or where both debtor and creditor shall reside without the limits of this state, it shall and may be lawful for such creditor, by himself, his agent, or attorney, to attach the property, both real and personal, which may be found in the state of such debtor, in the same manner, and under the same restrictions as are or shall be usual in the case, of absconding debtors, or where the debtor alone resides out of the state.

2. It shall and may be lawful for the judges of the Superior, or justices of the Inferior Court, or any one of them, and also for any justice of the peace, upon complaint made on oath, that his debtor resides out of this state, or is actually removing without the limits of this state, or any county, or absconds, or conceals himself, or stands in defiance of a peace-officer, so that the ordinary process of law cannot be served on him, to grant an attachment against the estate of such debtor, or so much thereof as shall be of sufficient value to satisfy the plaintiff's demand, and costs—which attachment shall be directed to and served by the sheriff of the county where the property may be found, or his deputy, or any constable; and it shall be the duty of such sheriff, his deputy or constable, to serve and levy the same upon the estate, both real and personal, of such debtor, wherever the same may be found, either

in the hands of any person indebted to, or having effects of such debtor, and summon such person or persons to appear at the next court to be held for said county, and to which the said attachment may be returnable, there to answer on oath what he is indebted to, or what effects of such party he hath in hand, or had at the time of levying such attachment—which being returned executed, the court may, by order, compel such person to appear and answer as aforesaid. And where any person, in whose hands any debt or effects may be attached, shall deny owing any money to, or having in his hands any effects of such debtor, it shall be lawful for the plaintiff to traverse such denial, and thereupon an issue shall be made up and the same be tried by a jury—and if found against such garnishee, he, she, or they, shall be subject to pay the plaintiff such sum as shall be so found, and the court shall order judgment to be entered thereof against such garnishee, as in other cases. *Provided*, that the said judge, justice of the Inferior Court, or justice of the peace, before granting such attachment, shall take bond and security of the party for whom the same may be granted, in double the sum to be attached, payable to the defendant, for satisfying and paying all costs which may be incurred by the defendant, in case the plaintiff suing out such attachment shall discontinue or be cast in his suit; and also, all damages which may be incurred against the said plaintiff for suing out the same, which bond shall be returned to the court to which such attachment may be made returnable, on or before the last day of the term; and the party entitled to such cost and damages, may bring suit and recover thereon—and every attachment issued without such bond taken, or where no bond shall be returned as aforesaid, is hereby declared to be illegal and shall be dismissed with costs. *Provided always*, that every attachment which may be issued as aforesaid shall be attested by the judge of the Superior or justice of the Inferior Court, or justice of the peace issuing the same, and be by the sheriff or person authorised to serve the same publicly advertised at the court-house of the said county, at least thirty days before the sitting of the court, and if any attachment shall be issued within thirty days of the sitting of the next court, such attachment shall be made returnable to the court next after the expiration of the said thirty days, and not otherwise; and all attachments issued and returned in any other manner than

is herein before directed, shall be and the same are declared to be null and void—and all goods, chattels, lands and tenements, subject to such attachment, shall be repleviable by appearance and putting in special bail, or by the defendant's giving bond with good and sufficient security to the sheriff or other officer serving the same, which bond he is hereby empowered to take, compelling the defendants to appear at the court to which attachments, shall be returnable, and to abide by and perform the order and judgment of such court—*Provided always*, that all goods and effects attached and not replevied as aforesaid, whenever the same shall appear to be of a perishable nature, on motion of the plaintiff or his attorney, the court, or if not in term time, the judge of the Superior, or any two or more of the justices of the Inferior Court, may and are hereby authorized and required to order a sale of such perishable property, and the monies arising from such sales shall be deposited in the clerk's office, by the sheriff or other officer selling the same, to answer the demands of the plaintiff, if established, and the balance, if any, after satisfying such demands and costs, shall, by order of said court, be returned to the defendant or his attorney.

3. If any attachment shall be returned executed, and the property attached shall not be replevied as aforesaid, the subsequent proceedings shall be the same as an original process against the body of the defendant, where there is a default of appearance, and all such goods and chattels, lands and tenements, not replevied, shall, after the plaintiff has established his demand, be, by order of the court, sold and disposed of for and towards the satisfaction of the plaintiff's judgment, in like manner as if the same had been taken under execution ; and where any attachments be returned served, in the hands of a third person, it shall be lawful upon his appearance and examination in the manner heretofore directed, to enter up judgment as against the original debtor, and award execution against such third person, for the monies due by him to the absent debtor, and against such property or effects as may be in his hands or keeping, belonging to such debtor, or so much thereof as will be of value sufficient to satisfy the judgment and costs thereon.

4. Where an absent debtor has property lying in different counties, the same shall be liable to attachment, and an original

and copies shall issue for each county where the property may be found, the whole to be returnable to the court from whence the first original issued.

5. When the third persons, as garnishees, return debts due to the absent debtor, the court shall order the same sued for, and when recovered, paid into the clerk's office, subject to the order of the court.

COURT OF VICE ADMIRALTY.

HALIFAX.

In the case of the *Zodiack*, Hague, master.

DR. CROKE—The *Zodiac* was taken by his majesty's schooner *The Alpheia*, commanded by lieut. Jones, upon a voyage from New York to Lisbon, with a cargo of flour and rice.—A claim has been given by James Hague, the master, for the vessel, as the sole property of Jonathan Ogden, of New York, a subject of the United States; and for the cargo generally, on behalf of Mr. Ogden, and all such persons as shall appear to be interested; not being able to speak positively to the ownership, the shipment having been made by F. J. Sampayo, a natural born subject of Portugal, and consigned to a Portuguese house at Lisbon.—He proceeds to state, "That the schooner by which he was taken, was a vessel which had carried despatches from the officers of government at Halifax, to the American government, and had, for many days previous to the sailing of *The Zodiac*, enjoyed the rights and privileges of a flag of truce, under the act of Congress protecting vessels of her description from seizure, by American ships of war, and he believes that she sailed under a protection from the American government; being thereby secured against capture by any ships belonging to The United States of America," and he concludes by praying restitution and damages.

If this was merely a claim as for American property, this court would certainly not proceed to adjudicate upon it, because in

the hostile, or at least, ambiguous state of the two countries, under his royal highness, the prince regent's order in council, to detain and bring into port all vessels belonging to citizens of the United States, without giving any authority to condemn them, no property of that description could either be condemned or restored. But upon the master's allegation, that the capturing vessel was sailing under a passport, or flag of truce, a question of a very different nature arises, not whether American property, as such is liable to seizure, condemnation or otherwise, but whether *The Alpha*, under the circumstances in which she was placed had any right to detain this vessel, and to bring her into port in any case, either generally, or even under the orders in council, which issued before the capture, but were not known to *lieut. Jones*. This is a question of an interlocutory kind, previous to any adjudication upon the property; and if it shall appear that the capture was improperly made and ought to be restored, the court will decree restitution, or otherwise it will remand the ship and cargo to safe custody under the order for detention.

It has been said on behalf of the captor, that if this capture should prove to have been illegally made, still that the claimant, as an enemy, could not be entitled to receive it, but that as in other cases of captures where the captor was disqualified from taking, it must go to the king, with whom it would remain to make restitution to the claimant. That the claimant in this case, as an enemy, is not incapacitated from suing, or receiving restitution has already been determined by the court upon the former hearing upon the return to the monition to proceed to trial, and likewise with respect to the propriety of an intervention on the part of the crown. I shall only observe, therefore, at present, that there is an essential difference between the cases of non-commissioned vessels and of forfeitures for misconduct, which have been now referred to and this case, inasmuch as that in those cases, the general right to make the capture from the enemy was not called in question, a general condemnation was supposed, and the only point was to determine to whom the condemned property should belong. In this case the question is whether a condemnation could take place at all. If the vessel was illegally captured, neither the captor, nor the crown can have any right or interest in it. Those were municipal questions, as between British parties, this

is a question upon the law of nations, between country and country.

It has been denied likewise that the court could give, or the claimant could recover damages. But, surely, if the court has cognizance of the principal cause, it must have equally a jurisdiction over all the incidents connected with it. If the party is not disqualified from recovering his property, he must be equally capable of receiving a compensation for an injury done to it.

The first and principal point in this case, is to ascertain the real character of *The Alpha*, as it appears in evidence.

Upon the standing interrogatories, Hague, the master, swears "That the schooner, at the time of capturing his ship, was actually sailing under a flag of truce, with despatches from the American government to the British government."

George Brown, the first mate, has been examined upon the claim, and he deposes "To his having seen a passport in possession of lieut. Jones, which was signed by Mr. Monroe, the secretary of state to the government of the United States, which deponent read; the substance and purport of it was to protect said schooner *Alpha*, on her return from New York to Halifax, with despatches for the government at Halifax, and he believes that she had for several days previous to the sailing of *The Zodiack* enjoyed the rights and privileges of a flag of truce under the act of congress protecting vessels of her description from seizure by American vessels. He is clear and positive *The Alpha* sailed under the protection of the American government, from Mr. Jones's permitting him to read the passport, and from his, Mr. Jones's declaration of being so protected by it, as well as the vessel under his command." He further says, "That on the day preceding the arrival of *The Alpha* in this port, to wit, on Wednesday, the fifth of August, they were chased by an American privateer schooner which they supposed to be *The Teazer*, and lieutenant Jones, finding that said privateer was coming up with *The Alpha* very fast, called the deponent up from below, and told him the privateer was then in chase of him, but that he, lieut. Jones, could not take her if she came up, nor the privateer take him, as *The Alpha* was sailing under a flag of truce. The deponent observed at the time that the white flag was bent already to hoist on the haulyards at the foremast, but deponent did not see it at any

time hoisted at the mast-head, nor did he ever see it but on this occasion, which was the first time they saw an American ship. Lieutenant Jones, sometime after the privateer was gaining on him, ordered the flag of truce to be got ready, in the hearing and presence of deponent, and then ordered this deponent, and all the crew of The Zodiack below, and sometime after, as deponent has since been informed, the white flag was hoisted at her foremast-head, and kept there till the privateer sheered off, when he was called up and found the privateer steering away.—He further says, that the only time lieut. Jones informed him that The Alpha was a flag of truce, or permitted him to read the passport, was when the privateer was in chase of them.”—This is confirmed by the deposition of Wm. Ray, the second mate, with the additional circumstance, that “*the white flag was hoisted before he was ordered below.*”—An affidavit has been made by Vice-Admiral Sawyer, then commander-in-chief upon this station. He states, that in the month of August last, his majesty’s schooner Alpha, commanded by lieut. William Jones, arrived in this harbour, having a passport from the American government to protect her from the ships of war of that nation—that the said schooner, as the said lieut. Jones informed deponent, was protected, and in every respect considered, while remaining in New York, as a flag of truce, and this deponent also considered the said schooner to all intents and purposes, to be a vessel of that character and description.—That upon the said lieut. Jones’ informing him that he had captured the said ship, the deponent expressed in strong terms his surprise and displeasure at the improper conduct of the said lieut. Jones, in so doing, and on the arrival of the said ship Zodiack, at Liverpool, in this province, the deponent directed that every possible step should be forthwith taken for the immediate restitution of the said ship and cargo.”

Besides these depositions there is a statement of facts which has been agreed to on both sides. It admits “That the schooner Alpha is an armed cutter belonging to the king, and commissioned as a vessel of war in his majesty’s service, commanded by William Jones, a lieutenant in the royal navy.—That the schooner Alpha in obedience to an order from the Admiralty, received the June mails from the general post-office at Falmouth, with an order to deliver the same at Bermuda, New York, and Halifax.

That when lieut. Jones sailed from England he knew nothing of the United States of America having declared war against England, nor was it known at Bermuda when he arrived there and delivered the mail for that island; and that he sailed from Bermuda without any knowledge of the war with America. That on going into New York he heard of the American war, being boarded by an officer belonging to a ship of war of the United States, and after having his papers examined by the officer, he was informed the day after his arrival, that as he had brought a mail from England, the government of the United States would allow him to deliver the same, and to remain without molestation; that in a few days afterwards he received a mail for Halifax, together with a passport from the government of the United States, allowing him to depart and to pursue his voyage to Halifax without molestation from the ships of war or privateers of the United States, until his arrival at Halifax. That shortly afterwards he sailed from New York to Halifax, captured the ship *Zodiack*, in the course of his voyage, and arrived safe at Halifax. That the said schooner had, during the whole of the aforesaid voyage, the usual number of guns, and arms on board, that belonged to her class, with ammunition and warlike stores of all sorts, proper for such a vessel in his majesty's service."

Before I proceed further to the consideration of this evidence, I must dispose of some arguments which have been advanced in favour of the captor: that it was his duty in every case to take American ships by his general commission as an armed vessel, the United States having declared war, and likewise under the orders in council, to detain *all* American property. Now, not to mention that lieut. Jones had no commission or authority against the United States, as the declaration of war was not known in England when he sailed, and that the orders were not known to him, having issued only the day before the capture, upon broader grounds it is evident that commanders of armed vessels are bound to execute their commissions only according to the usual practice of war, and that the orders in council, like all other laws and authorities given, must be subject to the usual mode of interpretation. There must be some tacit exceptions to the orders for detention.—They could not command impossibilities, either natural or moral. It never could be understood to be the intention of

the prince regent to authorize any proceedings in violation of the law of nations, nor would they afford any justification for them.

It is not necessary to consider the original state of this vessel. The question is not under what orders she sailed from England, or arrived at New York, but what was her character at the time of making the capture.

By the whole tenour then, of this uncontradicted testimony, it is fully established, that at the time of seizing this vessel, The *Alpha* was sailing under a passport, which had been granted by the proper authorities of the American government, which had been accepted, and has been distinctly admitted by the commander of the vessel. That he had availed himself of the benefit of it, not only whilst he continued at New York, where he would have otherwise been seized, but likewise upon his voyage to protect himself against an enemy's cruiser.—And that the validity of the passport had been acknowledged by the commander-in-chief upon the station.

Under facts so clearly proved, this case becomes subject to the application of those principles of publick law which relate to captures made by vessels having a passport or safe conduct.

What these are in general, are so well and so commonly understood, that it is scarcely necessary to enter into any long discussion concerning them. No officer in his majesty's service can be ignorant of them. It is universally known that by passports privileges are granted by nations at war to particular ships, for their mutual convenience. They are highly useful, since they contribute to soften the severities of war, and to promote the restoration of peace. They are therefore observed by all civilized nations with scrupulous delicacy and correctness. They are certainly in the nature of compacts, because, there is something to be done or submitted to on both sides, and one nation cannot by any acts bind another without its own consent. They may be, therefore, and frequently are, the subject of treaties, which must then be punctually observed. But it is not necessary that there should be any express agreement between the two nations in question, much less any particular contract entered into with the persons concerned. They are founded upon a compact of which the terms are partly expressed, and partly understood from general usage, and they depend upon the established conventional law of

nations.—To a vessel thus employed, in a communication between the two countries, with a passport, protection from capture is granted by the one nation, and the other engages that the vessel employed shall abstain from all acts of hostility. These must be the conditions necessarily understood, for otherwise such vessels would thereby be only enabled, under the protection, to annoy more effectually the protecting country, and without these conditions, understood or expressed, no passports would ever be granted, and nations at war would lose the benefit derived from them.

Since, then, to effect the intended object, the privileges must be mutual, as far as the vessel bearing a passport, and all vessels she may encounter, are concerned, all rights of war must be suspended, and a partial state of peace must reciprocally exist. In case of a violation of these privileges, there must be the same mode of redress on one side as on the other. If a cartel, or flag of truce is taken, it is admitted that they may be restored by a Court of Admiralty to an enemy claimant. If a vessel of that description should make a capture, the owners of the captured property would be entitled to the same remedy. A Court of Admiralty must be the proper tribunal in both cases, and the capacity of the claimant to obtain restitution is founded in each of them upon the same principles—a partial cessation of hostilities, and his being *quoad hoc*, in the king's peace.

A capture then, made in breach of these conditions is a wrong done to the party, and to his nation, and is a departure from the publick faith. *The laws of war are as sacred as those of peace, and in the execution of the delicate trust committed to this court, of sitting in judgment between this country and every other nation in the world, it is its duty, with the most unbiassed impartiality, to administer the same rule of justice to the enemy as to the most friendly, or allied nation. But to do so is only to act in conformity to the universal practice of G. Britain, to a mode of conduct which has ever formed the basis of her peculiar character and glory. However unjustifiable may be the proceedings of other nations; though they may commence an unjust war against her, in denying her the right of self-defence against hostile measures professedly aimed at her destruction; in refusing her the common right of claiming the services of her own subjects, in the time of danger, in virtue of that alle-*

giance in which they have been born, educated and protected; if they should have charged her with malicious and unfounded calumnies, still, even under such provocations, I trust she will ever exhibit the same fair example of undeviating justice and unshaken magnanimity.

In a case, therefore, like the present, in which a young and inexperienced officer, through inadvertence has been guilty of infringing a solemn duty, it is the office of this court to remedy the evil, as far as is in its power, and to place the injured party as near as may be, in the same state as if no such capture had been made, by a restitution of the property, and a liberal compensation for all losses occasioned by the capture and detention.

In estimating those damages, if the first error was occasioned by inadvertence, I am sorry to be under the necessity of observing, that the same excuse cannot be extended to the subsequent proceedings since the capture.—Vice-Admiral Sawyer deposes, that “upon the arrival of the ship *Zodiack*, at Liverpool in this province, he *directed* that every possible step should be forthwith taken for the immediate restitution of the ship and cargo.” There was nothing to have prevented their being immediately restored by the consent of the captors. If any doubts or difficulties had presented themselves, they might at once have been removed by an application to the court. Instead of complying with these directions of the admiral, three months have been suffered to elapse since the capture. It has indeed been attempted to set up an excuse for the delay which has occurred, by a statement that the vessel and cargo, with her papers had been delivered up to the master, with permission to go away, but that he afterwards refused, and insisted upon damages. This proceeding aggravates, rather than alleviates, the impropriety of the captor’s conduct. If a restitution by consent was intended, it should have been done under the authority of this court which would have been attended with little or no delay. Such clandestine proceedings, without bringing captures before a proper tribunal, after they have been brought into port, is contrary to the established practice of civilized nations, and is prohibited under severe penalties by the laws of the country.

The vessel, then, was taken on the 1st of August, and she arrived at Liverpool on the 9th. On the 28th a petition was brought

in, for an order for the unlivery of the cargo, on account of the leaky state of the vessel, yet the papers were not brought into the Registry, or a monition applied for, till the 2d and 3d Sept. The captor not having given an allegation, a petition was filed upon the 28th September for a monition to compel him to proceed to adjudication, stating, "that the cargo was suffering, and great expense incurred, that the claimant had filed his claim, and had had every reasonable expectation that the captor would have consented to a decree of restitution without further delay, as hopes to that effect had been given them on account of the avowed illegality of the capture; but to this measure the king's advocate on behalf of the captors refused to accede, because the petitioner insisted upon prosecuting his claim for damages." The king's advocate appeared to this monition, and moved to be discharged from it, upon grounds then stated, which were over-ruled by the court, and the cause now comes on upon the claimant's monition. Of the unnecessary delays, which have taken place in this cause, especially, as it appears, upon an uncontradicted affidavit, that they were employed to induce the claimant to recede from pursuing his just claim for damages, this court must express its decided disapprobation.

This vessel upon her capture was ordered to proceed to Halifax, but the master swears, that "The prize-master being very young and inexperienced, he has reason to believe that in consequence thereof, and of the bad management on board the ship, she struck on Ragged Island Reef, and received so much damage, that she was obliged to put into the port of Liverpool, in this province. It was found upon examination that she had received so great damage that it became necessary to take out part of her cargo, and to keep the pumps going. In this state she remained until the 18th, on which day the ship was delivered up to the claimant, when he sailed from Liverpool, with part of the cargo, the other part being brought to Halifax in vessels hired for that purpose, it being necessary to lighten her. Since her arrival the residue has been taken out, and placed in stores: that a considerable part of it has been destroyed by the breaking down of a store.—From all which losses and accidents the voyage of the said ship, and her original destination, has been totally lost, and great damages and expenses have been incurred, and large sums of mo-

ney required for repairs." This statement is fully confirmed by the deposition of the first mate, and, as far as he had opportunities of observing, by the second mate, and is uncontradicted by any evidence on the part of the captor. Where a capture is unjustifiable upon the face of it, the claimant is entitled to a compensation for such damages as may have happened in consequence of it, even by unavoidable accident, but in this case, there is a stronger ground, for the injury to the vessel and cargo appears to have been occasioned by the unskillfulness of the prize-master, for whose misconduct, negligence or ignorance, the captor is specially answerable.

Considering then the manifest illegality of the original capture, and likewise that the delay has been solely owing to the captors themselves, they can have but little reason to complain of an undue severity, if the court decree to the claimants the restitution of this ship and cargo, together with a full compensation in costs, damages, expenses and demurrage for the losses which have been sustained, and it which awards, not upon the score of a vindictive penalty, but as a mere measure of common justice;—not to punish the offender but to save harmless the innocent sufferer—not to bestow a boon upon the enemy, but to vindicate the honour of Great-Britain.

Danish Instructions.

WE Frederick the sixth, by the Grace of God, King of Denmark and Norway, the Wends and Goths, Duke of Sleswick, Holstein, Stormarn, Ditmarsk and Oldenburg: make known:

That whereas we find it corresponding with circumstances to renew the acts for privatering from our dominions, which for some time had been stopped, and to establish new regulations, according to which prize cases are to be acted and decided upon we hereby do publish such rules, recalling our former will of 24th of September, 1807, concerning privateering and the lawful decision of prizes.

Sec. 1. No person or persons within our dominions are permitted to act as privateer without being furnished with a lawful commission for this purpose.

Such commissions are henceforth to be issued out from the Royal Board of Admiralty, and are to be furnished with the seal of the said court. Such commissions to be granted to none but such persons, as either by birth or naturalization have acquired the privileges of Danish citizens or to other ships or vessels but such as carry guns, or the crew of which at least are furnished with weapons.

2. Every ship or-vessel that proceeds to sea on privateering, is to be commissioned by a person who is skillful in navigation, and who, before he is entrusted with his commission, has signed his name upon oath to these regulations and promised to obey them, as well as any other orders communicated to him, through our Royal Board of Admiralty.

3. The commissions for privateers are to be to the following purport:

“According to his majesty’s most gracious orders, it is hereby made known to all persons concerned, that owner of the ship or vessel burden lasts according to the royal bill dated the 28th of March, 1810, has obtained permission to fit out the said ship or vessel commanded by in order to cruize against our enemies, (being furnished with guns or other weapons) for the purpose of capturing, or if necessary, destroying all ships or vessels belonging to the crown of Great Britain or its subjects, or of stopping and carrying in, in order to be lawfully examined, such ships as are suspected to belong to the said power, or to be connected with it, in a manner incompatible with the laws of neutrality. The owner has deposited the security ordered, and the commander has declared upon his sacred oath to obey the royal orders issued out for privateering as well as such others as may be given from the Royal Board of Admiralty for this purpose.

The Royal Board of Admiralty, Copenhagen.

Signed and sealed.

4. Petitions to obtain commissions for privateering are to be sent in to the magistrate of that place whence the ship or vessel, destined for privateering, is to be fitted out.

He who obtains such a commission ought, as security for such damage as might be occasioned by an illicit use made of the commission, to find bail to the magistrate for a certain sum from 1000 to 15,000 rix dollars. The magistrate in fixing this sum is to take reference to the number of the crew of the ship, so that security at all events be given to the amount of 1000 rix dollars, but as to the rest, that the sum of 100 rix dollars is computed for each man on board.

Further are the owners as well as the commander, (the former with the vessel, the latter with his person and property) responsible for all such damage that may be done to the ship captured.

5. Those privateers to whom lawful commissions have been granted, are allowed to carry the royal Danish pendant and ensign with our royal cypher in the middle of it, referring ourselves as to the rest, to the regulations ordered in the bill of the 11th of January, 1743.

6. The privateer is bound, as far as it lies in his power, to take and carry in for condemnation all such ships and vessels, as belong to and are proved to be the property of the subjects of the crown of Great Britain.

He is also permitted to bring in for examination every other ship or vessel, the neutrality of which, according to the 10th section of these regulations is not lawfully proved, or against which grounded suspicions may be formed upon any of the reasons mentioned in the 12th section.

Further—he is authorized to carry in all such ships as may have passed the Sound or the Belt, without paying the duty ordered and which consequently have no certificate; the penalty (being the double of the duty ordered) to be forfeited to him.

7. No privateer is allowed, (under punishment of losing his commission, or any other punishment according to circumstances) to stop any ship or make any use of his commission within the territories of a friendly or neutral power, which generally are supposed to reach one league from shore.

With regard to privateering at Oresound, it is to be observed that the privateers must avoid approaching the Swedish batteries or shore so near that they might be reached by their guns.

8. As we acknowledge as an inevitable rule that free ship constitutes free cargo, we hereby most positively forbid every cruiser

furnished with commission as privateer, to capture any ship belonging to powers that are neutral or in friendly relation with us, (whomsoever the cargo may belong to) provided the papers regarding the ship or the expedition are in proper order, and the ship has no contrabands of war on board bound to any country belonging to his Britannick majesty, nor be under any of those predicaments mentioned in the 6th sec. as subject to condemnation.

9. As free ship constitutes free cargo, thus on the other hand, hostile ship constitutes hostile cargo.

10. The ship's papers, which according to the eighth section ought to be in proper order, are the following :

The sea passport issued out by the government of that country whereof the ship's owner is a subject, or by a magistrate authorized by such government. Instead of this document, however, any other legal document, proving that the commander, by that government whose real subject he is, mediate or immediate, is authorized to use that neutral flag he sails under on his present voyage, shall be accepted of and credited.

The bill of sale or purchase of the ship, in case he that had the ship built disposed of her to another, then both documents (as well that of her building as that of the purchase are requisite) provided both circumstances be not mentioned in one and the same document. In case the ship formerly had been captured as prize, as such condemned, then the act of condemnation serves in lieu as well of the document stating where the ship was built as of the bill of purchase, this is however upon a condition that a proper document of the auction held over the ship or any other proper document proving the lawful disposal of her, is annexed to the act of condemnation.

To ships, which, after having been formerly condemned in a foreign state, and to those bought by neutral citizens proceed thence only with ballast home, the act of condemnation with the document of this auction or any other document of her being ceded over to another person, ought to be a full substitute in lieu of the other papers ordered, the ship's journal excepted.

Bill of gauge, which must be issued out by the officer appointed to measure ships at the place where the ship is stated to belong to; it must agree with the passport, or, which is instead of it,

The list or roll of the crew properly certified by the respective officers ; a full and clear account of all the persons found on board, and not stated in the roll, is also requisite. This list also must prove, that neither the captain, mate, supercargo, factor, commissioner, nor more than one third part of the crew are British subjects.

The receipt for having paid the duty or custom ; this document is also to state where the cargo was shipped, and whither it was bound.

The charter party or bill of lading, or if no charter party was written, then only the bill of lading, which ought to state whither the ship was bound : and finally,

The ship's journal of the whole voyage mentioned in the passport, with an exception of such ships which only sail from one port in the Baltick to another.

11. As good and lawful prizes are to be considered :

All such ships as evidently belong to the crown of Great Britain, or to subjects of his Britannick majesty, in whatever part of the world they may reside.

Such ships as carry on a smuggling trade to, or from Great Britain or the countries which are under the dominions of the said power, by feigned and forged papers of clearance, as well outward as homeward bound, sail to the abovementioned countries from such places wherein no clearance is allowed, or from these countries to a place where no admittance from thence is allowed.

Such ships as either entirely or partly are loaded with contrabands of war, and which are proved to be bound to harbours in Great Britain, or which have on board officers or privates that are engaged or are to be engaged in the service of the enemy, as well as such ships that might approach a squadron which blockades a Danish city or harbour, or province, in order to trade with the enemy for provisions or refreshments.

Such ships the crew of which with force oppose the examination of the privateer. In like manner those ships that, notwithstanding their flag is considered neutral, as well with regard to Great Britain as the powers in war with the same nation, still either in the Atlantick or Baltick, have made use of English convoy.

Such Danish, Norwegian, or relative to Great Britain, hostile ship, which after having been captured by the enemy, is re-captured, a third part of the value of the ship and cargo thus re-captured, is due to the captor, whether such ship be taken before or after the expiration of the space of twenty-four hours, the two-thirds to be returned to the owner. If such ships on the contrary are re-captured which as well with regard to us as to the enemy, are neutral, the re-captor is to be paid an equivalent for his danger and trouble according to the decision of the court of justice.

12. As suspected and subject to a further examination may be brought up :

Such ships as are not furnished with the documents mentioned in the tenth section.

Such ships as have double papers or documents, which according to appearance are false.

Such ships, from which papers have been thrown overboard, or by other means destroyed, particularly if this has taken place after the privateer was within sight.

Those ships, the commanders of which have refused to comply with the privateer's request to open such recesses, wherein contrabands of war or documents relating to the expedition of the ship are suspected to be concealed.

Ships under the above named predicaments are to be treated according to the preceding sections, provided the suspicion against them be not removed by authentick proofs of their neutrality and lawful destination.

13. As contraband of war, (as mentioned in the 11th section) are to be considered: guns, mortars, and all kinds of weapons, pistols, bombs, grenades, balls, firelocks, flint-stones, matches, gun-powder, saltpetre, sulphur, breast-plates, swords, bandoliers, cartouches, saddles and bridles: such articles as the above-mentioned, however, excepted, as are necessary to the defence of the ship and crew.

When the privateer meets a ship that goes by a friendly or neutral flag, he is to hail the commander in order to make him come on board with his ship's documents.

If these are in proper order, he is directly to suffer the ship to proceed on her voyage, without demanding any thing of whatever nature.

If on the contrary he finds ground to suspect unfair dealing, he is allowed to go on board the vessel to examine her more thoroughly.

14. During this examination, he must not venture to break open any drawers, chests, trunks, barrels, casks, or any thing else wherein the cargo may be put up, nor in any usurping manner investigate into such part of the cargo that may lay scattered about in the ship; but when he has a suspicion of contraband of war or suspicious papers being concealed any where, he is to order the commander to open such recesses which are supposed to contain them, and afterwards again to lock them.

That privateer who acts contrary to these orders is to pay the damage, forfeit his commission, and besides be punished according to the circumstances.

15. If a privateer brings up a ship, he is forbid under the same penalty as mentioned in the 14th section to unload, sell, change, or in any other way to dispose of, or part with any part of the cargo, but he ought in concert with the captain, purser, or mate of the ship captured, as far as possible, to seal and lock up the whole of the cargo unopened (as far as the preservation of the cargo does not require the contrary) to any of those places that are mentioned afterwards.

17. In case of necessity, he is permitted to take victuals and ammunition out of the ship captured, but he is to give the master of her a list of it, signed by himself.

If the ship carried in, afterwards be condemned in his favour, what has been thus taken away, is to be deducted from his share, but in case the ship be not condemned he is to refund in money what has been taken out of the ship.

18. All papers, passports, letters and journals, the privateer, after having perused them, shall be obliged to put up and seal, to which the master of the ship adds his. They remain in the possession of the privateer unopened until they may be delivered up to the magistrate of the place where the ship is brought in.

19. The privateer is to proceed to sea from a harbour within our dominions; the prizes he may happen to make during the expedition, are to be carried to such a toll-place in Denmark, Norway, Sleswick or Holstein, as he may find most convenient, or to the nearest place where he may be protected by military force,

but to no foreign places, at the risk of losing his commission and the sum deposited as security, unless he is forced to do so by stress of weather, for want of provisions, or by being pursued by the enemy; and if this be the case he shall be bound, (without meanwhile breaking the bulk) to proceed with the first favourable wind to a custom-place within our dominions.

20. If the cargo, however, consists of goods, which according to their nature easily are spoiled, or the ship through average cannot proceed on her voyage, he is permitted to apply to the magistrate of the place where he enters, in case it be within our dominions, and in foreign countries, to the nearest Danish consul, who are to take such measures as are the most proper for the preservation of the ship and cargo.

21. As soon as the privateer enters into any harbour within our dominions with a prize, he is directly to apply to the judge of the place, who immediately, and at furthest within 24 hours, is to undertake and finish the examination as well of the privateer and her crew as of the master of the ship captured, together with the crew and passengers; he is minutely to examine and cross-examine them about the ship's course according to the journal and other circumstances; he is to investigate into the authenticity of the ships documents mentioned in the 10th section, the passports of the passengers, their situation on board, voyage and errand, as well as the place where the ship was seized, the conduct of the privateer before, under, and after the capture, and in short, he is to examine into every thing necessary to the illustration of the case.

22. During the proceeding, it is the duty of the judge in general to consider the interest of both parties in the most careful manner, and before the final decision, summon, as well the privateer as in particular the master of the ship captured, to declare whether they wish for any further illustrations, or have any thing further to observe, upon which he is to receive and to reflect upon the claims of both parties.

The utmost attention and zeal in this respect are hereby inculcated on all judges, the more so, as, in order to promote the quick expedition and discharge of justice, so necessary in law proceedings (and in particular for the ship captured that may expect a release) we have suffered the parties to meet by proxies before the High Court of Admiralty.

23. The judge, attended by two citizens residing at the place duly sworn, is to take down a true inventory and it is to be observed: that this is to be taken of the cargo according to the contents of the ship's documents and no unloading to take place unless the privateer insists upon it, or the judge has grounded suspicions of unfair dealing which might be discovered by the unshipping or other circumstances might render it necessary for the preservation of the cargo.

24. This being observed, and the case by the respective judge discussed so far that sentence at the prize-court may be pronounced, the proceedings of the court ought to be taken by the secretary and to be sent by a speedy messenger to the said court together with the inventory and the rest of the documents. The judge then informs both parties that the case will be decided upon by the prize-court as soon as possible, and that no farther summons before that court will take place.

25. To judge of prize-cases in the first instance we have appointed:

A prize-court for the Island of Zealand, Lolland, Falster, Møen and neighbouring islands (the island of Samsø excepted)—It is held at Copenhagen:

One for the northern parts of Jutland and the dioceses of Fyn and Samsø; this is held at Aarhus.

One of the dukedoms of Sleswick and Holstein held at Flensburgh.

One for each of our provinces of our kingdom of Norway, held in the capital of the respective province.

One for the islands of Bornholm and Christiansø held at Ronne.

Each of these courts to be constituted of a justitiarius (president) and two assessors, among whom an officer of our navy.

A secretary is appointed at each of these courts.

26. If the prize-court finds any further illustrations necessary in a case, the court ought to charge the judge who has held the examination, to procure such as may be wanted.

27. At the making up of the sentence, every circumstance ought most minutely to be considered, no other letters or proofs however ought to be taken into consideration, but such as were found on board the ship when she was captured, as it is only left

to the High Court of Admiralty to decide how far any of the parties may be allowed to produce further evidence or proofs.

The final issue of the sentence of the prize-court, is to be published in the official tidings of the province by the secretary of the court, the sentence itself upon the demand of the parties, is immediately to be copied and delivered to them for their further use.

28. If any of the parties wish to appeal from the sentence of the prize-court, he ought to declare such intention within twenty-four hours after the annunciation of the sentence to his antagonist, and afterwards within the space of eight weeks procure summons from the High Court of Admiralty, which is held in our royal residence Copenhagen, and give proper warning to the judge and his antagonist, agreeable to the bill of April 30th, 1806, containing the instructions for the High Court of Admiralty.

The summons of appeal in Zealand are applied for in the High Court of Admiralty. Out of Zealand the chief magistrates, and at Bornholm, and at Christianso'e, the governours are authorized to issue out such summons in behalf of the High Court of Admiralty.

When the case is decided by the said court no further appeal is granted.

29. If a privateer bring in a ship upon any other foundation than those authorized in this our royal bill, he is not only to defray all the expenses of the case, but moreover to repay all the damage suffered by the ship on account of this seizure.

If, on the contrary, the capture is grounded, the privateer is without any responsibility, though the ship, upon the foundation of certain circumstances, is released; in this case the expenses arising from the case and capture, are to be defrayed out of the ship.

If any of the parties without any sufficient ground, appeal from the sentence pronounced, he may expect (if his antagonist insists upon it) to be sentenced to pay the loss he thereby may have suffered, besides the expenses of the law-suit.

30. When any ship captured is condemned in favor of the captor, he is not allowed to dispose of the ship and cargo according to pleasure, but both parts are to be sold generally at the place where the ship is brought in.—Out of the amount of the sale,

besides the usual salary, one per centum is to be paid to the hospital of invalid sailors at Copenhagen, which sum, it is the duty of the judge to receive and transmit to the direction of the said institution, receiving their quittance.

31. The privateers are exempt from paying the usual duty; no clearance of duty is consequently requisite at their setting out; at their return they need only to announce their arrival at the custom-house, in order that it may be ascertained they import no goods. Out of the goods, on the contrary, which are carried in and condemned, all duties of every denomination are to be paid, similar to other goods imported.

32. The expenses before the court in prize-cases we have fixed in a particular bill for this purpose; in the like manner we have ordered the sum to be paid for commissions of privateering.

33. Every captor of a ship, either hostile or suspected, is to take care of the victualling the crew, from the time of the capture till the sentence of the prize-court is pronounced, the expenses to be defrayed out of the ship, when the case is closed.

In the like manner, and upon the same condition, the victualling of the crew of the ship captured, while the case is pending before the High Court of Admiralty, is to be furnished by the captor, provided the sentence of the prize court be appealed to by the captor. The captor, on the contrary, if he has won the case before the prize-court, and appeal is made by the captured, is not bound to feed the crew, unless the master of the ship gives full security for the expenses paid on this account.

34. The magistrate of the place is to receive and deliver up to the nearest fort, such of the crew of a ship captured and condemned, as are subjects of the British crown, where they are considered as prisoners of war; as far as they prove to be subjects of neutral or amicable powers, they are to be delivered up to their respective consuls.

35. We do hereby forbid our magistrates or other officers to whom we have entrusted the execution of these our orders, or who are employed in the proceeding or decision of prize-cases, to partake in any expedition of privateering. Nor must any auctioneer, who is commissioned to sell any ship or cargo condemned, buy them on his own account.

36. A copy of these regulations and instructions for privateers to be on board of every privateer.

These be our will and orders, according to which every one is to conform.

Our royal residence of Copenhagen, 10th March, 1810.

Under our royal hand and seal. (L. s.)

KAAS,
COLD,
KNUDSEN,

BULOW,
MONRAD.

BALTIMORE COUNTY COURT.

October, 1811.

Henrietta Galt v. Merryman, Sheriff.

Attachment on money in the hands of the sheriff, under fi. fa.

COURT.—Money in the hands of the sheriff is not the property of the plaintiff until it is paid over; and therefore it is not liable to be attached for his debts. Courts will not suffer the execution of one process to interfere with another. If this money may be attached, you prevent the sheriff from bringing it into court, as, by the writ, he was ordered.

Attachment Quashed.

J. SCOTT for plaintiff—HOFFMAN for defendant.

CIRCUIT COURT OF THE UNITED STATES.

MARYLAND DISTRICT.

May term, 1812.

Benjamin Hitchen, *et al.* v. Wm. Wilson & Sons.

This was a libel for wages. The vessel had been captured and condemned. Pending the appeal she was restored to the underwriters, to whom she had been abandoned, upon a compromise. The defendants were willing to pay the seamen's wages, after deducting the expense of recovering the property. But the District Court decreed full wages; and the sentence was affirmed in this court.

John Wesley, *et al.* v. James Biays.

Libel for wages. The vessel was captured and sent in for adjudication. The master offered to discharge the seamen and find passages home for them, but they refused to quit the ship. She was condemned; but, upon appeal, the decree was reversed. The vessel then prosecuted her voyage and returned to Baltimore. The District Judge, decreed wages for the whole time, including the delay at the port, where the vessel was sent in for adjudication, which sentence was affirmed by this court.

Baxter v. Biays.

Biays was bail for one Merrihu. After the *sci. fa.* issued, and within the time allowed by the rule for a surrender of principal, Biays surrendered Merihu before Houston, J. during vacation, who ordered an *exoneretur* to be entered. But by Duval, Ch. J.—there is no law authorizing a surrender before a judge at his chambers, nor is there any rule of court to that effect. It was once attempted before Judge Hanson, and refused.

Jones, *et al.* v. Smith and Buchanan.

Libel for seamen's wages. The libellants were shipped in December, 1807, on board the ship *Rebecca*, for a voyage from Baltimore to Batavia, and thence, if required, to one or more ports beyond the cape of Good Hope, and back to Baltimore. On the 18th of May, 1808, the vessel arrived at Batavia, and completed her unloading 3d June. On the 27th April, 1809, she sailed thence for Japan, in the employment of the Dutch government. On the 24th May she was captured by the British and sent to Bombay, where she was condemned, on the 3d January, 1810, as being Dutch property, and as infringing the orders in council, for the prevention of trade in enemies' ports. (7th Jan. 11th Nov.)

There were three descriptions of claimants. 1st. The administrators of seamen who died at Batavia. 2d. Those who died after leaving Japan and before the capture. 3d. Those who returned to Baltimore. —

For the Libellants. It is true that where a voyage is broken up the seamen lose their wages ; but this is a principle of law which should apply to them with as little rigour as possible. When a voyage is divisible into many parts, the seamen are entitled to each part as soon as it is performed. That part is an

entire voyage, though a loss may happen afterwards. This is a mitigation of the former rule, by which seamen were made insurers of the voyage. In contracts of freight, if the charterer does any act by which the goods or vessel are lost, he must nevertheless pay the whole freight. So in insurance, if a deviation be committed, the insurer is discharged. In this case, the long delay at Batavia was a deviation—and consequently a termination of the first voyage. What reason was there for such a delay? If the seamen could be kept there one year, their articles would hold them there half a century, or any indefinite term. Batavia was held out as the chief port, the *terminus ad quem*; and the ports “from thence” were to be visited in continuation of that voyage. The voyage to Japan was a new voyage, and entirely out of the usual course of business. The taking on board a Dutch governour and Dutch property was an increase of the peril, because it subjected the vessel to suspicion and condemnation, and it would be very unreasonable to make the seamen incur a hazard which was never communicated to them.

For the Respondents. The whole contract respecting bills of exchange arises from legal implication: not a word is inserted by legal implication. So it is in the mariner's contract; every seaman knows what his contract binds him to do. It is immaterial if he is ignorant of his duty—for the law will not believe him. What benefit has the owner derived if the mariner perform but a part of the voyage. Here the owners lost the whole voyage, and the court is called upon to apportion the contract. The vessel was at Batavia during the operation of the embargo, and the seamen subsisted at the expense of the owners. If the seamen had been brought home they would have been idle.

The law of insurance may safely be allowed to apply to this case. The stay at Batavia was not only reasonable but absolutely necessary, by reason of the embargo. It is absurd to contend that seamen are entitled to know what shall be the operations of a voyage. Such a doctrine is practically pernicious to the state, and destructive of all commercial enterprize.

If the sailing from Batavia be a new contract, where is it? Whether that new contract arise from implication or record is immaterial; for that voyage, if it be called a new voyage, was entirely broken up by the capture.

DUVAL, Ch. J—This is a case depending on the terms of the shipping articles. The voyage was to commence at Baltimore, and proceed to Batavia; thence, if required, to one or more ports beyond the cape of Good Hope, and back to Baltimore.

The terms of the articles are plain, and must have been clearly understood by the parties. There is a difference of opinion as to the effect of the voyage, from Baltimore to Batavia; the difference commences there. On the one hand, it has been contended that the extension of the voyage to Japan, was not justified by the articles, and that the ship was engaged in an unlawful commerce; on the other, that it was in pursuance of the terms of the articles, and that that commerce was lawful.

The court have no doubt on this point. It appears to them to be within the letter and spirit of the shipping articles, and that there was nothing in the voyage repugnant to the principles of neutral rights. The condemnation at Bombay under the orders in council cannot be regarded by this court. This court denies the legality of the orders in council, which are founded on the prostration of the principles of neutral rights and in their decisions they will respect only the general law of nations.

The only question about which a doubt can arise, is, as to the time when the claim of the mariners for wages, whilst at Batavia, shall cease.

The court think it a case in which they ought to exercise a discretion, more particularly as the vessel waited at Batavia for some time, for instructions.

They are of opinion, and so order, adjudge and decree, that the mariners be paid to an intermediate day between the third day of June, 1808, the time when the vessel was unladen, and the 27th April, 1809, the time of her sailing from Batavia, that is to say, until the 15th November, 1808.

That the representatives of the mariners who died before that day, receive wages until the time of their decease; and of them who died afterwards, receive in common with the survivors, until the 15th November, 1808.

SCOTT, BRICE and HARPER, for libellants.

PURVIANCE & PINKNEY, for respondents.

HIGH COURT OF ADMIRALTY.

May 30th, 1811.

Fox and others—Judgment.

SIR WILLIAM SCOTT.—This was the case of an American vessel which was taken on the 15th of November, 1810, on a voyage from Boston to Cherbourg. It is contended, on the part of the captors, that under the orders in council, of 26th April, 1809, this ship and cargo, being destined to a port of France, are liable to confiscation. On the part of the claimants it has been replied, that the ship and cargo are not confiscated under the orders in council; first, because these orders have, in fact, become extinct, being professedly founded on measures which the enemy had retracted; and secondly, that if the orders in council are to be considered as existing, there are circumstances of equity in the present case, and in the others that follow, which ought to induce the court to hold them exonerated from the penal effect of these orders.

In the course of the discussion a question has been started, what would be the duty of the court under orders in council that were repugnant to the law of nations? It has been contended on one side, that the court would at all events be bound to enforce the orders in council: on the other, that the court would be bound to apply the rule of the law of nations applying to the particular case, in disregard of the orders in council. I have not observed, however, that these orders in council, in their retaliatory character, have been described in the argument as at all repugnant to the law of nations, however liable to be so described if merely original and abstract; and therefore it is rather to correct possible misapprehension on the subject than from the sense of the obligation, which the present discussion imposes upon me, that I

observe that *this court is bound to administer the law of nations to the subjects of other countries*, in the different relations in which they may be placed towards this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its written law, evidenced in the course of its decisions, and collected from the common usage of civilized states. At the same time, it is strictly true, that *the king in council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce*; and these constitute the written law of this court. These two propositions, that the court is bound to administer the law of nations, and that *it is bound to enforce the king's orders in council*, are not at all inconsistent with each other; because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the court itself; or they are possible regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.*

* The American reader may compare with this doctrine the language of the duke of Newcastle, or the former opinions of Sir William Scott, himself:

In answer to the objection made in the Prussian remonstrance against the condemnation of Prussian vessels, during the war of 1739, (that the Admiralty Courts were *ex parte* tribunals, and their decisions not binding on other nations) the duke of Newcastle, then secretary of state, in his letter, inclosing the report of the four law-officers, observes, "that the courts, both Inferiour and Courts of Appeal, always decide according to the universal laws of nations only; except in those cases where particular treaties between the powers concerned have altered the dispositions of the law of nations." In the report itself it is declared, "that this Superior Court (of the Lords of Appeals) judges by the same rule which governs the Courts of Admiralty, viz. the law of nations, and the treaties subsisting with that neutral power whose subject is a party before them," that in England the crown never interferes with the course of justice. No order or intimation is ever given to any judge;" that "had it been intended by agreement to introduce between Prussia and England a variation, in any particular, from the law of nations, and consequently a new rule for the Admiralty to decide by, it could only be done by a solemn treaty in writing, properly authorized and authenticated. The memory of it could not otherwise be preserved; the parties interested and the Courts of Admiralty could not other-

The constitution of this court relatively to the legislative power of the king in council, is analogous to that of the courts of common law relatively to that of the parliament of this kingdom.—Those courts have their unwritten law, the approved principles of natural reason and justice—they have likewise the written or statute-law, in acts of parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the courts could extract from mere general speculations.—What would be the duty of the individuals who preside in those courts if required to enforce an act of parliament which contradicted those principles, is a question which I presume they would not entertain *a priori*, because they will not entertain *a priori* the supposition that any such will arise. In like manner this court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen: and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law. In the particular case of the orders and instructions which gave rise to the present question the court has not heard it at all maintained

wise take notice of it further. In the judgment pronounced by Sir William Scott, in the case of the Swedish convoy (2 Rob. 295) the independent and elevated attributes of his judicial station are painted with his usual eloquence. "In forming that judgment," says he, "I trust that it has not escaped my anxious recollections for one moment, what it is that the duty of my station calls for from me, namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer, with indifference, that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question if sitting at Stockholm: to assert no pretension on the part of Great Britain, which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to G. Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question."

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in argument, that as retaliatory orders they are not conformable to such principles—for retaliatory orders they are. They are so declared in their own language, and in the uniform language of the government which has established them. I have no hesitation in saying, that they would cease to be just if they ceased to be retaliatory; and they would cease to be retaliatory, from the moment the enemy retracts in a sincere manner those measures of his which they were intended to retaliate.

The first question is, what is the proper evidence for this court to receive, under all the circumstances that belong to the case, in proof of the fact that he has made a *bona fide* retraction of those measures. Upon that point it appears to me that the proper evidence for the court to receive, is the declaration of the state itself, which issued these retaliatory orders, that it revokes them in consequence of such a change having taken place in the conduct of the enemy. When the state, in consequence of gross outrages upon the law of nations committed by its adversary, was compelled by a necessity which it laments, to resort to measures which it otherwise condemns, it pledged itself to the revocation of those measures as soon as the necessity ceases.—And till the state revokes them, this court is bound to presume that the necessity continues to exist; it cannot, without extreme indecency, suppose that they would continue a moment longer than the necessity which produced them, or that the notification that such measures were revoked, would be less publick and formal than their first establishment. Their establishment was doubtless a great and signal departure from the ordinary administration of justice in the ordinary state of the exercise of publick hostility, but was justified by that extraordinary deviation from the common exercise of hostility in the conduct of the enemy. It would not have been within the competency of the court itself, to have applied originally such rules, because it was hardly possible for this court to possess that distinct and certain information of the facts to which alone such extraordinary rules were justly applicable. It waited therefore for the communication of the facts; it waited likewise for the promulgation of the rules that were to be practically applied.—For the state might not have thought fit to act up to the extremity of its rights on this extraordinary occasion: it might from motives of forbearance, or even of policy unmingled with any injus-

tice to other states, have adopted a more indulgent rule than the law of nations would authorize, though it is not at liberty ever to apply a harsher rule than that law warrants. In the case of the Swedish convoy, which has been alluded to, no order or instruction whatever was issued; and the court, therefore, was left to find its way to that legal conclusion which its judgment of the principles of the law led it to adopt. But certainly if the state had issued an order that a rule of less severity should be applied, this court would not have considered it as any departure from its duty to act upon the milder rule which the prudence of the state was content to substitute in defence of its own rights.—In the present case it waited for the communication of the fact and the promulgation of the rule. It is its duty in like manner to wait for the notification of the fact that these orders are revoked in consequence of a change in the conduct of the enemy.

The edicts of the enemy themselves, obscure and ambiguous in their usual language, and most notoriously and frequently contradicted by his practice, would hardly afford it a satisfactory evidence of any such change having actually and sincerely taken place. This state has pledged itself to make such a notification when the fact happens: it is pledged so to do by its publick declarations—by its acknowledged interpretations of the law of nations—by every act which can excite an universal expectation and demand, that it shall redeem such a pledge. Is such an expectation peculiar to this court? most unquestionably not. It is universally felt and universally expressed. What are the expectations signified by the American government in the publick correspondence referred to? Not that these orders would become silently extinct under the interpretations of this court, but that the state would rescind and revoke them. What is the expectation expressed in the numerous private letters exhibited to the court amongst the papers found on board this class of vessels? Not that the British orders had expired of themselves, but that they would be removed and repealed by publick authority. If I took upon myself to annihilate them by interpretation, I should act in opposition to the apprehension and judgment of all parties concerned—of individuals whose property is in question, and of the American government itself, which is bound to protect them.

Allusion has been made to two or three cases in which this court is said to have exercised the power of qualifying and moderating the general terms of an order in council, as in the case of *The Lucy, Taylor*, in which the general terms of the order subjected to confiscation all ships transferred by the enemy to neutrals, during the war, and yet this very court held that these general terms did not extend to prize-ships so transferred by the enemy. But what was the ground of interpretation? It was this—The rule itself was adopted from the rule of the enemy, and upon a principle of exact retaliation; for it was declared in the express terms of the preamble of the order, that it was just to apply the same rule to the enemy which he was in the habit of applying to this country. And when the court found upon satisfactory evidence, that the enemy did not apply any such rule to prize-ships, but especially exempted them, it would have pronounced, in direct contradiction to the avowed principle of the order itself, if it had not followed the enemy in this acknowledged distinction. It has likewise been urged that cases may be found in which the court has presumed a revocation, though no such revocation has been promulged. And it is certainly true, that where an essential change in the circumstances that occasioned the order has, in effect, extinguished its subject matter, and that change of circumstances has been publicly declared by the state, the court has not thought it necessary to wait for a formal revocation itself. In the case of the *Baltick* order, by which, in compliance with the wishes of its allies in the war, the government of this country granted an immunity from the molestation of capture in that sea; the court held that order to be revoked, when the state had declared that most of those states to whose applications, as allies, that indulgence had been granted, had changed the character of allies for that of enemies. It was quite unnecessary to wait for such special revocation, when, by the general declaration of war, hostilities had been authorized against them.

Admitting, however, that there may be cases of presumed revocation, does it follow that this is, with any propriety, to be considered as one of those cases? The novelty of these orders in council, the magnitude, the complexity, the extraordinary nature of the facts to which they owe their origin; the attention which they called for and excited, both at home and abroad, the pledges

given by this state and accepted by other states, all disqualify this court from taking upon itself to apply a presumed revocation in any such case.

Supposing, however, that the court felt itself at liberty to accept, as satisfactory, other evidence of a sincere retraction of the French decrees, what is the amount of the evidence offered? No edict—no publick declaration of repeal—no reference to cases in which the courts of that country have acted upon any such revocation. The only case mentioned was that of the New Orleans Packet, and it was brought forward in such a way, so void of all authenticity, as to make it hardly possible for me to allude to it with any propriety, and much less with any legal effect. What the circumstances of that case were, in what form, and under what authority, and on what account released, did not at all appear—Whether at all applicable to the present question, whether a mere irregularity, or what was its real character, the court could not learn: this, however, is a matter of notoriety, that these decrees are pronounced fundamental laws of the French empire—that they were declared so in their original formation—and that they have been since so declared repeatedly and recently—long since the date of the present transactions. The declaration of the person styling himself duke de Cadore imports no revocation; for that declaration imports only a conditional retraction, and this upon conditions known to be impossible to be complied with. It has been urged that the American government has considered it otherwise, and has so declared it for the regulation of the conduct of the people of that country. If such is the fact, it is not for me to lose sight of that respect which is due to the acts of a foreign government so far as to question the propriety of any interpretation which they may have given to such an instrument. But when the effect of such an instrument is pressed upon me for the purpose of calling for my decision, I must be allowed to interpret it for myself, and to act upon that interpretation. And to me it appears, that the declaration, clogged as it is with stipulations known to be beyond the reach of all rational hope of any compliance, is in effect a renunciation of any serious purpose of repealing those decrees. I think I might invoke the authority of the government of the United States for denying to this French declaration the effect of an absolute repeal, when I observe

that the period which they have allowed to the British government for revoking our orders in council, extends to the 2d of February—an allowance which could hardly have been made if the revocation on the part of France had really taken place at the time to which that declaration purports to refer.

In the absence of any declaration of the British government to such an effect, there is a total failure of all other evidence, (if the court were at liberty to accept other evidence as satisfactory) that the French decrees had been revoked. If I were driven to decide upon that evidence, independent of all evidence to be regularly furnished by the government under whose authority I sit, I think I am bound to pronounce that no such revocation had taken place, and therefore that the orders in council consist in perfect justice as well as in complete authority.

It is incumbent upon me, I think, to take notice of an objection of Dr. Herbert, to the existence of the orders in council—namely, that British subjects are, notwithstanding, permitted to trade with France, and that a blockade which excludes the subjects of all other countries from trading with ports of the enemy, and at the same time permits any access to those ports to the subjects of the state which imposes it, is irregular, illegal and null.—And I agree to the position, that a blockade, imposed for the purpose of obtaining a commercial monopoly for the private advantage of the state which lays on such blockade, is illegal and void on the very principle upon which it was founded. But in the first place, (though that is matter of inferior consideration) I am not aware that any such trade between the subjects of this country and France is generally permitted. Licenses have been granted certainly in no inconsiderable numbers; but it never has been argued that particular licenses would vitiate a blockade. If it were material in the present case, it might be observed, that many more of these licenses had been granted to foreign ships than to British ships, to go from this country to France, and to return here from thence with cargoes. But secondly, what still more clearly and generally takes this matter out of the reach of the objection, is the particular nature and character of this blockade of France, if it is so to be characterised.

It is not an original, independent act of blockade, to be governed by the common rules that belong simply to that operation

of war. It is in this instance a counteracting reflex measure, compelled by the act of the enemy, and as such subject to other considerations arising out of its peculiarly distinctive character. France declared that the subjects of other states should have no access to England; England, on that account, declared that subjects of other states should have no access to France. So far this retaliatory blockade (if blockade it is to be called) is co-extensive with the principle: neutrals are prohibited to trade with France, because they are prohibited by France from trading with England. England acquires the right, which it would not otherwise possess, to prohibit that intercourse, by virtue of the act of France. Having so acquired it, it exercises it to its full extent, with entire competence of legal authority: and having so done it is not for other countries to inquire how far this country may be able to relieve itself further from the aggressions of that enemy. The case is settled between them and itself by the principle on which the intercourse is prohibited. If the convenience of this country, before this prohibition, required some occasional intercourse with the enemy, no justice that is due to other countries requires that such an intercourse should be suspended on account of any prohibition imposed on them on a ground so totally unconnected with the ordinary principles of a common measure of blockade; measures of blockade from which it is thus distinguished by its retaliatory character.

The last question is, are there any circumstances addressed to equitable consideration that can relieve the claimants from the penal effects of these orders. Certainly, if any could be urged that arose from the conduct of the British government itself, they might be urged with a powerful and even irresistible effect; but if they found themselves in the fraud of the enemy, or in the misapprehensions of the American government, induced by the fraud of the enemy, they found no claim on the British government or on British tribunals. In the one case they must resort for redress to a quarter where, I fear, it is not to be found—to the government of the enemy: in the other, where, I presume, it is to be found—to the government of their own country.

Upon the declaration of the American government, I have already said as much as consists with the respect which I am bound to pay to the declaration of a foreign government professedly neu-

tral. The custom-houses of that country, say the claimants, cleared us out for France publicly, and without reserve: they did so; but they left the claimants to pursue all requisite measures for their own security, in expectation I presume, that they would inform themselves by legal inquiry, whether the blockade continued to exist, if its continuance was uncertain. That it was perfectly uncertain in their own apprehensions, is clear from the tenour of these letters of instruction to the different masters of these vessels. In these letters, which are numerous, all is problematical between hope and fear—a contest between the desire of getting first to a tempting market on the one side, and the possible hazard of British capture on the other; and it is to be regretted that the eagerness of mercantile speculation has prevailed over the sense of danger. In such a state of mind, acting upon circumstances, the party must understand that he takes the chance of events—of advantage, if the event which he hopes for has taken place, of loss if it has not. It is his own adventure, and he must take profit or loss as the event may throw it upon. He cannot take the advantage without the hazard of loss, unless by resorting to British ports in the channel, where certain information may be obtained, on the truth of which all prospects of loss or profit may safely be suspended. On the British government no responsibility can be charged.—They were bound to revoke as soon as they were satisfied of the sincere revocation of the French decrees. Such satisfaction they have not signified, and I am bound to presume that no such satisfaction is felt. With respect to the demand of warning, the orders themselves are full warning.—They are the most formal admonition that could be given—and being given, and unrevoked, they require no subsidiary notice.

On the grounds of the present evidence, I therefore see no reason to hold the claimants discharged; but I do not proceed to an ultimate decision upon their interests, till I see the effect of that additional evidence which is promised to be produced upon the fact of the French retraction of their decrees, said to have been very recently received from Paris, by the American charge d'affairs in this country. Having no official means of communication with foreign ministers I shall hope to receive the information in a regular manner, through the transmission of the British offices of state.—Final adjudication suspended.*

* This vessel, and all others similarly situated, have since been condemned.

HIGH COURT OF ADMIRALTY.

July, 1812.

Judgment in the case of *The Snipe*.

SIR W. SCOTT pronounced the judgment of the court in the case of the American ship *Snipe*, the arguments upon which lasted several days. The journalist we copy expresses his regret that he is enabled to give but a feint sketch of the very luminous and eloquent speech of the learned judge on this occasion.

He began by stating, that, sensible of the great importance of the decision in this case, the principle of which involved several other cases of capture under the orders in council, before the 20th of May, 1812, he had directed his utmost attention to the arguments which had been urged with great zeal and ability on both sides, and was now prepared to give his judgment. The captors had contended that the ship was liable to condemnation under the orders in council, she having been taken on the 28th of March last, entering the river of Bordeaux; while on the other hand the claimants contended that those orders in council had ceased to operate before the capture, on account of a French decree, bearing date the 28th of April, 1811, having repealed the Berlin and Milan decrees, to which those orders had only been retaliatory measures, which the British government were pledged to annul from the date of the repeal of the French decrees.— Without feeling it necessary to dwell minutely on the history of all those transactions, he should state generally, that in November, 1806, the ruler of France published, in the most solemn and authentick manner, his Berlin decree, by which all neutrals trading to these countries were liable to capture. In January, and November, 1807, the British government published its retaliatory orders, which were not a full and complete retaliation, but which were founded on principles which appeared to him consistent

with those of justice and the law of nations. This was followed by the Milan decree of the enemy, *denationalizing* all vessels which submitted to our orders in council, or to be visited by British cruisers.—In April, 1809, another modification of our retaliatory measures took place in new orders in council ; and in March, 1809, America passed a non-intercourse act, both against France and this country ; declaring, however, that it should be annulled with respect to either of the powers that should repeal those instruments of which it complained. In consequence of this, M. Champagny, (the duke of Cadore) wrote a letter to general Armstrong, 5th August, 1810, informing him that those decrees were repealed, and would cease to operate against American commerce on the 1st of November, in that year, accompanying this notification with the condition, “ that it was to be understood that England also should abandon her orders in council, and her new principles of blockade.” This notification was considered by the American government as a repeal, and she in consequence repealed her non-intercourse act as with respect to France. This letter had been contended to amount to a repeal of the decrees, in the arguments on the case of the ship *Fox* ; but in the decision of that case, he had not considered it as a repeal. Since that time, on the 10th of March, in the present year, the duke of Bassano, in a state paper, published in an official manner, spoke of the Berlin and Milan decrees as still existing in full force, calling them fundamental laws of the French empire, and boasting of their powerful operation against the commerce and prosperity of this country. On the 21st of April, the British government published a declaration, offering to annul the orders in council, from the day that the French government, should by a subsequent decree, repeal the Berlin and Milan decrees ; and on the 20th of May they received from the American minister a paper purporting to be a copy of a French decree of that import, but bearing date the 28th of April, 1811. The British government, not recognizing the authenticity of this document, but wishing to conciliate America, did, on the 22d of June last, issue a declaration repealing the orders in council from the 20th of May. As to captures made prior to the 20th of May, to which this case belonged, this declaration was silent. It left them to the effect of the prior declaration of April, which, consistently with the general law of

nations, rested on the principle of retaliation. As the claimants now contended that the Berlin and Milan decrees were actually repealed by the French decree of 1811, it was for them to prove that those decrees were so repealed, and that they were repealed in such a manner as to impose an obligation on other nations to take notice of such a repeal. This sort of evidence, which was only to be got in the enemy's country, was perfectly accessible to the claimants (if any such evidence existed,) but was not accessible to the captors. The Berlin and Milan decrees had been ushered into the world with the greatest solemnity, and published in the French official papers. There was no one who could doubt their existence and authenticity. If those decrees were intended to be repealed why were they not repealed in a manner equally authentick and official? In the month of March last, they were, however, officially spoken of by the French government as not only being in existence, but as *fundamental* laws of the empire. If that word carried any meaning, it must imply that the French government would not abandon those decrees. Those decrees had been promulgated to the world in the most authentick and publick manner; and if there had been any intention of repealing them, it might be expected on every principle of good faith and honest policy, that the revocation should be made equally publick to all those whom it might concern. The rule was always *decretum non obligat, sed promulgatio*. This instrument should appear in such a shape as not to falsify itself, or carry a fraud upon the face of it.—If its promulgation was not a matter of notoriety, but wrapped up in obscurity, it ceased to be a publication. There was no ordinary occasion, in the transactions of life, in which an instrument, having fraud and falsehood on the face of it, would be allowed to have any operation in a court of law. The letter of the duke of Cadore, dated the 5th of August, 1810, began by stating. “he was authorized to declare the Berlin and Milan decrees at an end.” These words were general; but afterwards came the condition, “it being understood that Great Britain will repeal her orders in council and her new principles of blockade, or that neutral nations will cause their flag to be respected.” A letter merely promising the repeal of those decrees, under certain qualifications and conditions, could never be considered an actual revocation. If any decree for repealing the Ber-

lin and Milan decrees was ever issued, why was it not published to the world in the same authentick manner that those decrees were? or why, when it was so often called for, both by our government and the American ministers, was not such a decree produced, or any evidence procured of its existence? Surely nothing could be more reasonable, than the demand for such evidence on the part of the American ministers. The revocation was held out as a boon to America; and when the fate of so much American property depended on the proof of the existence of this revocation, why was not this proof furnished, if it really existed? If it had existed, nothing would have been easier than to produce it. It must have existed in an hundred quarters.—in general directions to prize-courts—in the instructions to French cruisers—and in a variety of modes which would be easily proved. No proof of that sort was ever attempted. When the case of *The Fox* came to be argued in the year 1811, the claimants did not attempt to set up any other case except the duke of Cadore's letter, and the opinion of the American government that this letter amounted to a revocation as far as America was concerned. The opinion of the American government would, no doubt, regulate their practice; but it was no evidence to determine him, sitting in a court of law, to say that letter amounted to a repeal of the Berlin and Milan decrees. The claimants in that case were allowed abundant time to procure evidence; and if they could have procured any evidence sufficient to satisfy the judicial conscience of the court that those decrees were repealed, he had no doubt but that such evidence would have satisfied the British government. No evidence had been given of any practice which could induce a belief that the decrees even with respect to America, had been revoked at the time mentioned in the duke of Cadore's letter. On the contrary, there was the letter of Mr. Russel, the American minister at Paris, dated in May 1811, which stated, "That no ship brought into the ports of France since the first of November, 1810, had either been released or brought to trial." If the Orleans Packet was afterwards released, still he should ask, how could it happen that that vessel should be seized at Bordeaux some months after the orders were said to be revoked, and detained for such a considerable time, if ever any revocation of those decrees had been made publick? What would be said in this

country, if two months after the repeal of our orders in council, an American ship were to be seized under them at Liverpool, and detained for many months? The thing was almost impossible. If such a seizure were to take place here, the owners would immediately know that they were entitled not only to restitution, but to damages for the detention, and costs. The captors would also know it immediately and would be advised to lose no time in offering satisfaction. If the decrees were really revoked, it appeared to him absolutely impossible that such revocation should not have been known at Bordeaux, or that it should have required such a length of time to determine on those cases.

In March, 1812, the duke of Bassano mentioned in an official paper, that "the Berlin and Milan decrees were in full force, and that they were fundamental laws of the empire." In this assertion there was no exemption stated with respect to America, although that is now by far the most considerable, if not the only neutral power, likely to be affected by them. By his majesty's declaration of the 21st of April, the court was empowered to receive evidence from the claimants themselves of the repeal of those decrees, if they could procure any evidence to that effect. By the order of the 23d of June, the British government revoked the orders in council, and annulled their operation from the 20th of May last, leaving all the cases of capture before that period to the operation of the law.—The British government, however, by no means recognized the authenticity of the instrument put into their hands on the 20th of May, or acknowledged that paper as a *bona fide* decree of repeal, bearing the date prefixed to it; but revoked the orders in council, as a measure of conciliation to America. The date of this paper was neither subsequent to his majesty's declaration of the 21st of April, nor had it been publicly promulgated, nor had it been acted upon. To meet the terms of the declaration, it ought to have been a repeal of the Berlin and Milan decrees generally, and not merely with respect to America. It ought to have been unconditional, and its authenticity regularly proved.—This was, in fact, the title-deed under which the parties claimed, and its authenticity was, therefore, the first thing to be proved by them. The usual proofs of authenticity were either internal good faith or external legitimacy.—What was the external proof? This document had never been

published in the official papers of France: it had never been communicated to the American or any other government. The American minister did not say when he got it, or from whom he got it. If the court were to receive it as an act of the French government, it could only be out of deference to Mr. Russel. Supposing this to be a sufficient external proof, how was it verified internally? Instead of bearing the appearance of good faith, it was stamped with all the characters of fallacy and fraud. The paper had no appearance of authenticity on the face of it, as it bore date in April, 1811, and had never been produced or heard of until May, 1812. The date of the instrument was of great importance, when it was considered whether it was or was not a *bona fide* instrument.—An untrue date being found attached to it was a falsification of a fatal nature, when the deception was evidently intended for the purpose of fraud. There was every reason to believe that the instrument never had existed until the French government had received the declaration of the 21st of April. There was no individual who ventured to assert any knowledge of its previous existence. Every motive of just and honourable policy required that the greatest publicity should have been given to such a decree, if it had really been in existence, and that it was intended to be acted upon. If it had existed, and the American ministers knew of its existence, how could he have kept it back till the 20th of May, 1812? In the warm controversy which had taken place between America and this country on the subject, the correspondence on our part consisted very much in a demand for the production of any authentick document repealing those decrees. No such document was known by the American ministers—no such document was known to the tribunals or prize courts of France, or to those persons who were principally affected by it. Now in this country, every order which was given from the government to the prize-court was accessible to every body who was interested in it. Allowing to the French tribunals as much dishonest secrecy of their principles as any one could allow them, still it was evident, from their conduct, that they knew of no such document. He would be doing a great injustice, indeed, to Mr. Russel, if he were to attribute his silence on this head to any thing but his complete ignorance of the existence of such a document: he was the American minister in France at the date of this de-

cree, and yet he had never made any allusion to such a document in answer to the many pressing solicitations which had been made to him to procure evidence of the repeal. In the case of a ship taken under our orders in council where the crew afterwards rose upon the captors and carried the vessel into Havre, giving up nine Englishmen as prisoners of war to the enemy, the captain claimed the liberation of his ship, not in virtue of the pretended decree of repeal—but for this meritorious service ; and although the claim was finally allowed, yet Mr. Russel could never learn whether this liberation was not a special exemption from those decrees which had been said to have been repealed for many months.—Neither had Mr. Barlow heard of the existence of this paper, any more than Mr. Russel. If even this paper had existed, it would have no validity in law, for want of promulgation. When the ruler of France chose to send this paper into the world, antedated by above a year, it was evidently one of those exorbitant demands which that person is in the habit of making on the credulity of mankind. It was hardly to be doubted that this paper owed its existence to the declaration of the 21st of April last, and to claim now under such a document from the date it bore, was to require that it should have operation long before it existed.—The court would not now admit farther proof of such a document having been in existence. Such proof could only be sought in the *officina fraudis*, whence the fabrication first issued, with every stain of inbred corruption on its front. Some auxiliary proof had, indeed, been relied on, viz: two letters of the council of prizes in December, 1810. It was a little remarkable that these letters were not produced in evidence in the case of *The Fox*; but, it might, perhaps, be accounted for, from their affording a complete falsification of the duke of Cadore's letter. They, in their turn, were falsified by Mr. Russel's letter of May 8, 1811, which stated, that no American vessel brought in since the 1st of November had either been released or brought to trial. It is true that he stated that two months after, they had all been restored, in the beginning of July. Mr. Russel had since come to this country, and had put in an affidavit, in which he states, "that he believed that no American vessel had been condemned in the French ports since November, 1810, as he is of opinion, that in such case he must have heard of it." This affidavit was only, however, as to

his belief and opinion.—If our orders in council were repealed in this country, there would be no doubt or uncertainty about the matter. He should next proceed to make some observations on those cases which were said to prove that those decrees were in fact repealed as to America. There was first the case of *The Acastus*, bound from Norfolk to Tommingen; and which after a very long detention, was at last discharged by the French emperor on condition that it should be proved not to have violated the French navigation-laws. On this case he could only say, that it appeared strange how a neutral ship coming directly from its own country to the ports of another neutral, could, for a moment, be supposed to be violating any French navigation-laws.

The next cases were those of the schooner *Fly*, from New York, ostensibly bound to Petersburg, and which was carried into Cowes, but afterwards proceeded to Havre; and the case of *The Phœbe* from Boston to France. As to the first of those cases, he would say, that as it was a fraud in favour of France, it was not surprising that the vessel was not seized; but both these two cases were cases of vessels sailing with French licenses. In fact, of the seven cases, which had been relied on, three were of vessels sailing with French licenses; two were of vessels restored, not by the judgment of any tribunal, but from the mere pleasure of the sovereign; and one, (that of *The Anna Maria*,) where no proof was given that the French tribunals had any knowledge at all of that vessel having acted in violation of those decrees. There, therefore, did not remain one single case which had any authority at all; as acts merely of the grace and pleasure of the ruler of France could never be cited as the law of that country, or the rules which guided their tribunals. If there had been a practice in the French courts, founded upon this supposed decree, there must have been numerous cases which would have been determined by it; but of such, no evidence had been given. He would not allow that even the non-execution of the Berlin and Milan decrees could be properly considered as a repeal of them. The cessation in the exercise might arise from some motive of temporary policy; but a repeal ought to be publicly promulgated, and the cases which would be real authority in favour of the repeal must be the liberation of vessels by the judgment of the proper tribunals, and not by the special favour of the French em-

perour. It had been stated, that three American vessels bound to British ports were visited by French cruisers, and suffered to proceed to their destination. Such things as that had sometimes happened from particular circumstances even to British vessels, when the French cruisers had more prizes than they could man, or any circumstance made it inconvenient to them to take possession of them. The statements, however, proved rather too much, as two of these three vessels were laden with naval stores, which are already contraband of war; and it might as well be inferred from this, that France meant to abandon her acknowledged and undeniable maritime rights, as that she meant to give up her Berlin and Milan decrees. Whatever restitutions were made as mere acts of state, and not from the judgments of tribunals, could not be received as any authority to prove how the law stood in France. It might be said by some, that neutrals had no right to prescribe the mode of restitution, provided the restitution was in fact made. He, on the contrary, asserted, that they had a right to expect that in France, as well as every civilized country, there should be regular tribunals, where they might claim redress *ex debito justitiæ*, and not as a matter of court-favour, caprice, or state-policy. It appeared that the French ruler left the question of restitution to be determined by his special pleasure.—Now this country, did demand, and had a right to demand, that there should be a clear and definite rule of law, acting in a clear and definite manner; and that matters of this sort should not be left in a state of uncertainty or perpetual fluctuation. It, therefore, appeared to him, that there was no evidence that any legal revocation of these decrees had taken place; and that the instrument relied upon by the claimants as their title-deed, had no marks of authenticity about it, but was evidently fabricated for a particular purpose. There were many considerations connected with these transactions on which he did not feel himself now called upon to give an opinion. He should not, therefore, say how far a nation, calling itself, neutral, was justified by the law of nations, in separating itself from the general society of neutral nations, and accepting, as a boon for itself, an exemption from a principle which went to the direct subversion of all neutral rights; nor would he say to what extent this selfish favour would justify them, for not resisting such violations of the law of nations. He should deter-

mine on the case before him and on all those that depend on the same principle, that the instrument purporting to be a French decree, dated in April, 1810, did not take those causes out of the general operation of the law, as described in the orders in council ; and that, therefore, those vessels captured under them before the 20th of May last, could not be discharged from their operation. It was only to the vessels captured after the 20th of May, that the revocation of the orders in council applied. He felt peculiar satisfaction in thinking, that if his opinion on this important question should be erroneous, there was another tribunal (the Court of Appeals) in which it might be reconsidered.

NOTE. On the subject of the repeal of the French decrees, the editor of the Law Journal deems it proper to state, that on the 3d of March, 1813, the President of the United States made a communication to the Congress, inclosing a letter from Mr. Barlow the American minister at Paris, to Mr. Monroe, and another from the duke of Bassano to Mr. Barlow, which was accompanied by an official copy of the decree by which the Berlin and Milan decrees were repealed. It bears date 28th April, 1811. In the letter from Mr. Barlow to his government, he says, the duke "declared it had been communicated to my predecessor here, and likewise sent to Mr. Serrurier, with orders to communicate it to you." And the duke in the letter above referred to says—"that revocation was proven by many official acts, by all my correspondence with your predecessors, and by decisions in favour of American vessels."

Of cases of Recaptures.

*Translated from the Consolato del Mare, Chap. 287**

Sec. 1. If a ship is taken by the enemy, and afterwards another ship of a friend comes up and effects a recapture, the vessel and all that is in her shall be restored to the former proprietors, on payment of a reasonable salvage for the expense and trouble and danger that have been incurred; but this is to be understood of recaptures effected within the seigniority or territorial seas of the country to which the captured vessel belongs, or before the enemy had secured the vessel to himself in a place of safety.

2. If the recapture has been effected within the enemy's territories, or in a place where the enemy was in entire possession of his prize, that is, in a place of security, the proprietors shall not recover, nor shall the recaptors claim any salvage; for they are entitled to the whole benefit of the recapture, without opposition, from any rights of seigniority, or the claims of any person whatever.

3. If any enemy, having made a capture of a vessel, quits his prize, on appearance of another vessel, either from fear or from any doubt that he may entertain of her, and the vessel on whose account the captured ship was abandoned takes possession of the vessel that has been relinquished and brings her into port, she shall be restored to the proprietor or his heirs, without opposition, on payment of a reasonable salvage, to be fixed by agreement between the parties, or if the parties cannot agree, by the arbitration of creditable persons.

* The editor of this Journal has already announced to his readers his intention to publish a translation of this work. It is ready for the press, but in the present distracted state of the country it would be too hazardous an undertaking to print what probably none would purchase, and few would read.

4. If it should so happen that any one abandons his vessel through fear of his enemy, and any friendly vessel falls in with the ship that has been deserted, and brings her into a place of security, that is to say, in a case where the finding vessel has not retaken the ship from the enemy, and where the enemy had not carried her into a place of security, and had not taken her from the owner, the finders shall have no claim to the vessel nor to the cargo on board; but, by the use and custom of the sea, they may demand a reasonable salvage, to be settled either by agreement or by reference to the arbitration of creditable persons; for it is not fit that any should endeavour to take undue advantage of the misfortunes of another, since he cannot foresee what may happen to himself; and because every one should be ready to submit disputes, especially in cases like the present, to the arbitration of two unexceptionable persons.

5. It is besides to be understood, in all that has been said, that every thing shall be done without fraud; for no man can tell what may be his own case; and it sometimes happens that the deceit and injury which a person attempts to practice on others, lights upon himself: therefore, if any person knowing that a ship is going on a voyage, where she must be exposed to danger, or alarm from the enemy, fit out a vessel with a view, and for the purpose of doing injury to that ship or any other, in making salvage at their expense; or with a design of getting possession of the ship and cargo: if it can be proved against them, that they went out with any such intention, such persons shall not be entitled to any salvage on the ship and cargo, although the owner may have abandoned her; nor even although she may have been taken by the enemy.

6. If those, who fitted out the vessel, cannot establish in proof, that they did not arm with any of the beforementioned intentions; or if it should be proved against them, that they armed for the purpose of doing injury to any one, or generally to all, whom they might meet, in the form and manner of enemies; in such a case, whether they bring in a vessel with or without a cargo—whether it shall be retaken from the enemy, or merely found by them, they shall take no benefit from it, but the whole shall be restored to the former proprietors; and moreover such persons

so arming, shall be delivered over to justice to be treated as robbers and pirates, if the fact can be established in proof.

7. If they are not convicted of such an intention, having either retaken or found a vessel in any of the situations abovementioned, they shall be entitled to their full right and benefit; according to the preceding regulations. But if the matter shall remain in doubt, or if it shall rest with them to disprove the charge, neither they, nor any that were with them, nor any that are interested in the event, shall be received to give evidence in their favour; nor shall any person of a covetous disposition, nor any one who may be suspected of being biassed by money, be a witness for them.

8. If an enemy shall have made a capture of a vessel or cargo, and shall afterwards abandon it, voluntarily, and not from any fear or apprehension of any vessel coming upon him; and if any persons shall find the vessel or cargo that has been voluntarily abandoned, and bring it to a place of security, the property shall not be acquired to them, if any owner can be found; but they shall receive a reasonable salvage, to be fixed, at the discretion of reputable persons of the place to which the ship or goods shall be carried.

9. If, after the expiration of a reasonable time, no owner comes forward, the finders shall receive for their salvage one half of the proceeds, and the other half shall be applied in the manner that has been expressed and declared in a preceding chapter.*

10. If the enemy, being in possession of any ship or cargo, shall not have deserted it voluntarily, but shall have been obliged to abandon it by storm or tempest, or on account of any ship or vessel by whom he may have been alarmed, the same rule shall be observed as if the enemy had quitted the same voluntarily, and of his own accord.

* In chapter 249, the same proportion of a moiety is given to the finder of goods found floating in port, &c. after the expiration of one year and a day, if no owner appears to claim. The other moiety was to be divided into two parts, of which the lord of the jurisdiction was to retain one; and apply the other to pious purposes for the soul of the proprietor—"Allhora la giustizia debbe dare a quello che trovata l'havera, la meta per suo beveraggio, et della meta che rimanera, debba fare la giustizia due parti; et puo pigliarne lui una parte, et l'altra che rimane, debbela dare per amor di dio, dove a lui piace, per l'anima di quello di chi sara stata.

11. If the enemy, after a capture, comes to any place where he takes a ransom for his prize, if the proprietors wish to have their vessel or cargo, again, he or they, who have ransomed her, are bound to deliver her up to the original owners, on payment of the debt and charges, and some further allowance besides, if they choose to accept it.

12. If an enemy, on capture of a ship or a cargo, shall make a gift of it, such a donation or gift shall not be valid on any account; except that if a gift is made of the ship or cargo to those to whom it belonged, such donation shall be valid. But if the captor bargains with the master in these words, "We are willing to give you your ship for nothing, but must have a ransom for the cargo," such a donation shall not be good; because, in the case of which we are now speaking, the enemy had not carried it to a place of security, so as to say that he might not lose it; notwithstanding that, he might so far have obtained power over his prize as to be able to burn or sink it; though in such case, it would be totally lost both to him and to the owner. It is to be understood, therefore, that if the cargo is ransomed, the master to whom his ship has been so given, is bound to contribute to the ransom paid for the cargo, according to the value of the ship; and the same rule shall be observed, *e contra* also, and applied equally to the ransom of the ship or cargo.

13. If the captor shall have taken the prize to a place of security; that is, if it shall have been carried out of the seas of the enemy, where a recapture might be effected; if, when the captor shall have it in safe possession, and in his own power, he shall make a donation, or sale of the ship or cargo, such a donation or sale shall be valid, without exception, from any quarter; unless he, to whom the donation was made, should have accepted it with an intention of doing a kindness to the owner, and for his benefit; in that case he may restore it if he pleases; but otherwise, he is not compellable by any person, nor on any account.

14. If, however, he, to whom the property belonged, can show that there has been any *fraud* in the business, the donation shall not, on any account, avail; but he to whom it was made, ought to be seized by the lord of the country, and punished in goods, and in person, according to the circumstances of the case; and the ship or cargo shall be restored to the former owner.

15. If the ship or cargo shall have been sold by the enemy to any one, the sale shall be valid; provided that he, who has purchased, can show that the sale was made to him by the enemy in a place of security, that is, where the enemy held the goods in question, *in suo dominio*; and in case any one, who pretends to have acquired the ship or cargo by a just title, cannot prove the asserted sale, it shall not be valid; and if the former owner appears, and can make proof of his property, it shall be restored to him. The evidence of these disputed claims shall be discussed before two reputable persons of the country where the dispute arises, and without fraud; and if any fraud is discovered, the party against whom the fraud is proved, shall be bound to pay to the other party, costs, damages and interest; and besides, the party consenting to the fraud shall be delivered over to the justice of the country.

16. If the master, or person acting for him, recovers the ship or cargo by any means, he is bound to make restitution to the proprietors, according to their several proportions, on payment of the expenses *pro rata*

17. If the master shall redeem any part of the cargo, and make any agreement with the consent of the major part of his co-partners, by which he shall regain the ship or cargo, he may compel them to contribute, by course of justice, because they are as much under an obligation to him, as if they had agreed to take part in building or purchasing a new ship.

18. But if the master makes any agreement, without the consent of his partners, or the major part of them, they are not bound to any thing, unless they like it; nor is the master answerable to them for the rights and interests which they had in the ship at the time of capture; saving for any previous accounts which might be still remaining unsettled, respecting their shares in the ship or cargo at the time it was taken by the enemy.

19. If the original proprietors are disposed to resume their shares, and the master makes any opposition, the justice of the country may compel him to acquiesce; for there can be no ground of reasonable resistance on his part, if they are willing to pay their proportion of the expense; and it would be manifestly unjust that any one should dispossess the rest of their property.

20. But if the master, or any one for him, redeems his ship or cargo, after the enemy has gained a just title in it, and those who were part owners refuse to pay, as before specified, the master or his agent, ought to repeat his demand upon them several times, and call upon them to pay their share; and if they still refuse, it shall be put up to auction, with permission of the government and be disposed of to the best bidder.

21. If the ship or cargo shall be sold for more, after such refusal, than the ransom paid, the surplus shall be paid to the owners, according to their shares, if the master chooses it, otherwise he is not obliged. And the master shall have the privilege of retaining the goods in question at the price that others are willing to give for them.

22. If the sale shall not produce so much as the ransom, if the master made the ransom without the consent of his partners, they are not bound for the deficiency, unless they choose it; and therefore it is reasonable that the master, or his agent, should have the privilege of retaining, at the price that any other person would give, as the deficiency would fall upon him, saving however, that if any of the partners are inclined to resume their shares, they are bound to make good the deficiency to him *pro rata*. All the reasonings, and cases and conditions abovementioned shall be taken under the supposition that the enemy had carried the prize into a place of security; and that the ransom or sale had been made fairly and without fraud.

P. S. It may not be improper to add, as an observation pointing out the chasm between the regulations of this ancient code, and the prize-ordonnances of particular countries, and the provisions made in publick treaties, in later times, on the subject of prize; that neither the laws of Oleron, nor the ordonnances of Wisbuy, nor the Guidon, nor the ordonnances of the Hanse towns, contain any regulations respecting the general law of prize; scarcely mentioning the subject, except incidentally, amongst the accidents to which merchant-vessels are liable. There are, in the Black Book of the admiralty, a few, and but few, articles respecting it. In the ordonnances of Barcelona, of 1340, there are also a few articles, but relating rather to the division of interest between the captors, than to the general subject.

Review.

Code d'Instruction Criminelle, &c. i. e. The Code of Criminal Instruction, an edition corresponding with the original edition of the bulletin of laws ; followed by the motives alleged by the counsellors of state, and the reports made by the committee of legislation, of the legislative body, on each of the laws composing the code—with an alphabetical and arranged table, which collects on every subject the dispositions relating to it; and which indicates, in the article of every functionary and publick officer, all the functions that appertain to him; and that he is bound to fulfil in criminal matters, or those which are connected with the correctional or simple police.—8vo. p. 402.—Paris.

At rather a later period than we had at first intended, we proceed to the examination of another important branch of the law established in France, under the name of the *Code Napoleon*.

Perhaps it may be proper to begin by obviating a preliminary mistake, into which many readers may possibly be betrayed by the title of this volume, as at first seeming to import that the whole penal system is here laid down, including a list of all the crimes that are subjected to legal censure, and all the punishments by which they are visited; a discussion at no time unimportant, and which at the present period, when general attention has been directed to the subject by men of the most distinguished abilities, is peculiarly qualified to attract, in this country, the most anxious and painful consideration. So widely diffused, indeed, is the persuasion of the necessity of some amendment in our own penal code, that the ideas on which enlightened men have proposed, in France, to establish the foundation of their own future practice, in the most interesting part of jurisprudence, could hardly have been canvassed without suggesting some hints worthy of ample consideration among us; and those who know the difficulty attending many parts of the subject, will augur the more favourably of the code itself, from the length of time which has been employed in bringing it to maturity.

On the present occasion, however, our observations must be directed, not to the entire code of penal laws, but to that of *criminal instruction*; a phrase which the contents of this volume will authorize us to define as the whole series of proceedings that are instituted by law, between the commission of a crime and its ultimate legal consequences. The powers and duties of magistrates, the functions of the various courts, the obligations of public prosecutors, the method of compelling the attendance of witnesses, and the principles on which their examination is to be conducted, the mode of summoning juries and insuring their impartiality.—All these diversified details, practically of the most vital importance to the general security, and in a certain degree involving in their particular forms the abstract and fundamental principles of criminal law, yet susceptible without injury, of a great variety of modifications, are therefore included in the several titles of these new imperial edicts. We must not fail to advert to one striking innovation, which destroys the right of private prosecution with a view to punishment, and thus relieves the injured individual from the expense of bringing offenders to justice, while it narrows the operations of malice or resentment against the accused: but, having remarked this novelty, we shall pass over the minutiae of subordinate arrangement, and select a few of the most striking passages in the proposed mode of administering criminal justice.

The curiosity and sensibility of the English reader will be almost instinctively directed to the *trial by jury*: but, in the discussions here promulgated on this inestimable privilege, he will be surprized to find both the fact and the argument directly reversed. We are occasionally driven to admit that there is something at least questionable in the theory of juries: but whatever doubts or objections may appear to hang about the abstract reasoning, we “look at the *practice* and forget them all.” The French legislators, on the contrary, are loud in their praises of the theory, to which they find no objection but in their experience. The following extract from the address of Messieurs Treilhard, Real, and Jaure, counsellors of state to the legislative body, on presenting the first portion of the code, will perhaps serve to explain and reconcile all difficulty:

"To whom shall the trial* be confided? What is the authority which shall pronounce?"

"The great distinction between the law and the fact already occurs to our mind. Shall we have persons particularly and exclusively charged to decide on the fact? Shall that faculty be delegated to citizens chosen among the most enlightened and the most honest, who are strongly interested in the support of society by the advantages which they derive from it; and whose well known morality may guarantee to the accused that benevolent and careful attention which every man would claim for himself in such a painful situation?"

"If the jury could not be purified from the vices by which it was sullied at a fatal period, (*still too near ourselves, if we reckon the days only, but separated by a thousand ages if we regard events.*) that institution ought to be proscribed.

"But if we have not forgotten that it was demanded by the voice of the nation; if we recal the salutary effects which it produced until the period at which our intestine agitations corrupted its principles; if we do not wish to dissemble that no institution escaped that fatal influence which perverted the nature of the jury; if, in short, we are convinced, as we ought to be, that the social body is entirely freed from that impure atmosphere which enveloped it; and if we see the eclipse of the principles of order and justice dissipated on every side, it will be difficult for reflecting persons to renounce the institution of the jury. Why should we not behold the glory attached to the first days of that establishment shine forth once more? Is the French nation now less jealous of *its civil liberty*?† Is the blood of a citizen less precious? Is the hatred of crime less powerfully engraven in our hearts? Have we less disposition to purchase by a few moments in the course of our lives, a benefit of which we proved ourselves so jealous? and, when the same genius that has carried the glory of the French name to the extremities of the earth, proposed to confide the security of the people and the lot of future generations to the institution of juries—when the regards and the benefit of the

* *Instruction* is the word here employed, evidently in the limited sense which we have assigned to it in the translation.

† "A question not to be asked," we should have thought.

sovereign are about to be fixed on those who shall have performed its duties worthily—which of us brings his mind to it with disgust or coldness ?

“ Salutory reforms are doubtless necessary in the actual practice of the institution. It is proper to circumscribe the circle within which the jurors should be chosen ; it is right to secure to citizens the exercise of refusal not illusory, and to discover a method which should not give to the accused a premature acquaintance with their jurymen ; it was convenient also to prevent by a wisely combined organization, the too frequent summons of the same person. It was not desirable to create the *profession* of a jurymen ; nor to allow the repeated exercise of this honourable function to produce the double inconvenience of weakening, by habit, that profound veneration with which the juror ought to be penetrated when he sets his foot within the sanctuary, and of becoming burthensome to him by taking him too often from his ordinary occupations. In fine, in questioning the conscience of the jury, we ought to require only a simple answer, disengaged from all forms, and inspired by the force of profound conviction.

“ Experience dictated what ought to be and what has been done.

“ Let it be no longer repeated to us that juries are unacquainted with law and with judicial forms. What necessity is there for their understanding law and forms ? Is it to juries that the observation of the law and of forms is entrusted ? To pronounce on facts they will have far more valuable qualities, soundness of intellect, uprightness of heart, and a knowledge of the world.

“ They will always bring that profound and wholesome attention, which is never wanting in the exercise of an august function when it is rarely fulfilled ; they will be penetrated with a religious respect for misfortune, (for till the moment of condemnation no man is accounted criminal) a respect which is sensibly enfeebled in those who have the spectacle of misfortune always before them ; and, above all, they will not have contracted a certain insensibility which is not easy to avoid, towards calamities of which we are habitually made the witnesses.”

Thus the institution of petit juries is permanently incorporated, we hope, with the laws of France ; but the individual does

not enjoy the additional protection of a grand jury pronouncing an opinion on oath that sufficient grounds of charge exist to authorize his being called to make his defence in court. These previous inquiries are referred to the decision of certain inferior magistrates, and ultimately to the metropolitan tribunal, passing under the name of *La cour Imperiale*; and during the preparatory steps, the requisite industry seems to be directed towards securing the suspected person from unnecessary vexation, without too far extending the offender's chance of impunity. It is also to be observed that certain descriptions of offences are tried in a more summary and expeditious manner; for the counsellors of state remark that, "In preserving the jury they should not renounce another institution, which has been proved to be necessary by the experience of many years, that of special tribunals, established for crimes that cannot be too actively pursued, too promptly judged, or too exemplarily punished; and against certain persons, who, far from offering any the least pledge to society, are already signalized as its scourges." We here find rather an alarming admission of the questionable principle that the former character of a culprit may operate not only on his punishment, but also on the mode of his trial; and indeed in the performance of our present task we have been often led to suspect, from various parts of the code, that vagrants, persons without property, and such as are considered as old and notorious offenders, will run the hazard of encountering, on the day of trial, a torrent of overwhelming prejudice, the more dangerous from being to a certain degree, sanctioned by the language of the law.

Without pretending to trace an accusation through all its preparatory forms, let us now suppose that the *procureur imperial*, residing in the department which has been the scene of a crime committed, has reported his *proces-verbal* to the *procureur general*, who is satisfied that the accused should be put on his trial; and that, in fine, a majority of the judges of the Imperial Court are of the same opinion. Let us conceive the Quarterly Court of Assize to be sitting in its department, composed of a member of the Imperial Court, who acts as a president, and four of the senior judges among those who reside in the department. The *procureur general* is represented by a substitute, and the clerk of the tribunal, before which the antecedent depositions have been ta-

ken, assumes his seat as a member of the court, though he is invested with no judicial authority. The order of the trial then commences.

“The accused shall appear unfettered, and accompanied by guards only to prevent his escape. The president shall ask him his name, his christian names, his age, his profession, his residence, and the place of his birth.

“The president shall inform the counsel for the accused, that he can say nothing against his conscience, or inconsistent with the respect due to the laws, and that he must express himself with moderation and decency.

“The president shall thus address the jury, who shall stand uncovered.

“You swear and promise, before God and men, to examine, with the most scrupulous attention, the charges which shall be brought against N; not to betray the interest either of the accused, or of the society who accuses him; to communicate with none till after your verdict; to listen neither to hatred nor malice, to fear nor affection; to decide according to the charges, and the evidence in justification, according to your conscience and your entire conviction, with the impartiality and the firmness that becomes an honest and a free man.”

Each of the jurymen, called individually by the president, shall reply, raising his hand, “I swear this on pain of annulling the proceeding.

“Immediately afterwards the president shall warn the accused to be attentive to what he is about to hear.

“He shall next order the clerk to read the decree of the Imperial Court, referring the cause to the Court of Assize, and the act of accusation. The clerk shall read it with a loud voice.

“The president shall then remind the accused of the contents of the act of accusation, and shall say to him, “You hear what is imputed to you; and you will now hear the charge to be produced against you.”

Then follow some regulations respecting the interchange and publication of lists of the witnesses intended to be produced on either side, to which no addition is to be made without the express permission of the judges; and the charge is opened on the part of the prosecution.

“The president shall order the witnesses to withdraw into the apartment destined for them ; which they shall quit only when called to deliver their testimony. The president shall take precautions, if necessary, to prevent the witnesses from conferring with each other respecting the crime of the accused, before they shall have made their deposition.

“The witnesses shall depose separately, in the order established by the *procureur general*. Before deposing, they shall take the oath to bear witness without hatred or fear, to speak the whole truth, and nothing but truth, on pain of nullity.*

“The president shall ask them their names, their christian names, age, profession and residence ; whether they knew the accused before the fact mentioned in the accusation ; whether they are relations or connections either of the accused or of the party in the civil action, (i. e. the party injured by the offences, who may also recover damages against the defendant) and in what degree ; he shall ask them further, if they are not attached to the service of one or the other of them :—this done, the witnesses shall give their evidence orally.

“The president shall require the clerk to take a note of the additions, alterations, or variations, which may exist between the deposition of a witness and his former declaration.

“The *procureur general*, and the accused may require the president to have notes taken of such alterations, additions and variations.

“After each deposition, the president shall ask the witness whether it be of the accused present in court that he has meant to speak ; and he shall then ask the accused whether he wishes to answer what has been said against him.”

On criminal trials in this country, the practice is for the judge to ask the prisoner, at the close of each witness's deposition, whether he, the prisoner, would wish to put any further interrogatories, and not to call on him to answer till all the depositions have been concluded.

“The witness is not to be interrupted : but the accused or his counsel, may question him through the organ of the president,

* *A peine de nullité*, is the phrase here and in many other passages. It sometimes appears to affect the validity of all the proceedings : but in this place, probably, the evidence only of the witness neglecting to take the required oath would be set aside.

and say, as well against the witness as against his testimony, any thing that may serve to the defence of the accused.

This mode of questioning by the intervention of the president, instead of a direct address to the witness, would materially affect the privilege of cross-examination, which legal men among us highly prize, and of which witnesses so feelingly complain. On which side of the water the cause of truth is most judiciously consulted, we shall not here give an opinion.

“The president may likewise ask from the witness and the accused all the explanations which he shall deem necessary for the manifestation of truth.

“The judges, the *procureur general*, and the jurors shall have the same privilege, asking leave of the president. The civil party shall not put any questions either to any witness, or to the accused, except through the organ of the president.

With regard to the difference which will here be recognized between the English and the French mode of proceeding we acknowledge that we do not feel much hesitation in preferring the former ; which exempts the prisoner from the necessity of stating any facts, from the temptation of falsehood and deception to which he would be exposed, and from the danger of criminating himself by ill-advised admissions. In the agitation and anxiety naturally resulting from his awful situation, we think the truth could not be expected from him with any appearance of reason. The cool villain would artfully falsify the occurrences which would prove his condemnation ; and the innocent but weak man, overpowered by a sense of horror at being drawn by circumstances into a suspicion of guilt, might suppress or vary them so as to incur contradictions.

It is then enacted that the witnesses shall remain in court, till the verdict is pronounced ; and that the accused shall proceed to call his witnesses, either to prove exculpatory facts, or to establish his character. Provision is also made for paying the expenses of the witnesses.—What follows is of first-rate consequence.

“Evidence cannot be given,

“1. By the father, the mother, the grand-father, the grand-mother, or any other from whom the accused is descended, or any of those who are accused with him, being present and subjected to the same trial.

" 2. By the son, the daughter, the grand-son, the grand-daughter, or any other descendant;

" 3. By brothers and sisters ;

" 4. By persons connected in the same degree by marriage ;

" 5. By husband or wife, even after a divorce has been pronounced ;

" 6. By informers, whose evidence receives a pecuniary compensation from the law ;

" Without, however, the proceeding being annulled in consequence of any of the above-mentioned persons being heard, unless the *procureur general*, or the civil party, or the accused shall have objected to their examination."

Nothing can be more adverse to the prevailing principles that govern the English courts in matters of evidence, than this sweeping disqualification of so many persons as witnesses. We apprehend it to have been long the established practice of our judges, (who are rarely directed by statute in matter of evidence, which falls chiefly under the disposition of those unwritten and traditional rules that pass under the denomination of the common law,) to extend to the utmost the competency of witnesses, and leave the possible bias of interest or affection to operate against their credit only. To the indiscriminate adoption of this practice, a strong objection certainly exists, as it may tend to the commission of perjury—a greater evil, in many instances, than the suppression of truth : but surely the French code carries the opposite doctrine to a most unreasonable length. Of all the relations and connections above enumerated, as excluded by it from the power of being heard in a court of justice, only one has the same effect among us, that of husband and wife. Is it not extravagant to believe that the brother of a wife many years deceased, will in all cases, feel so warm an attachment to his brother-in-law, as to outweigh the obligation of an oath ? Besides, this monstrous ordinance affords complete impunity to those worst of crimes, which affects a man's domestick relations, and renders it nearly impossible to detect, for example, parricide or incest. The incompetency even of husbands or wives to appear for or against each other in this country, has, it is believed, been occasionally repealed by the necessity of the case ; but in the French code no exceptions are introduced, and the whole proceedings would be annulled if any

deviations were admitted—it would have been worthy of the legislators to consider whether they were not creating, in a depraved father, or an abandoned elder brother, a dreadful interest in corrupting those younger branches of the family, whom they are more especially bound to instruct and preserve; and early initiating them into crimes, as safe accomplices, who could never be permitted to disclose the guilt in which they had shared.

We have not time, however, to prolong our suggestions for the amendment of the jurisprudence of our neighbours; and indeed, we have little doubt that the defect, on which we have just animadverted, will speedily correct itself.—Among the provisions of minor consequence concerning the delivery of evidence in court, that which follows will illustrate the minute and cautious attention with which the legislators have anticipated possible obstacles to the trial of causes.

“If the accused be deaf and dumb, and cannot write, the president ex-officio shall appoint for his interpreter that person who has been most accustomed to communicate with him.—The same shall be done in regard to a deaf and dumb witness. In case the deaf and dumb should know how to write, the clerk shall write down the questions and observations which shall be made to him; they shall be transmitted to the accused or the witness, who shall give an answer or declaration in writing; and the whole shall then be read by the clerk.

“At the close of the depositions by witnesses, and the respective speeches to which they may have given occasion, the civil party or his counsel and the *procureur general* shall be heard, and shall enlarge on the proofs that sustain their accusation. The accused and his counsel may then answer them. A reply shall be allowed to the civil party and the *procureur general*: but the accused or his counsel shall always have the last word.”

This privilege is the reverse of the practice in this country, where the counsel for the prosecution in a criminal charge, and for the plaintiff, in a suit for the recovery of damages, is always permitted to be last heard.

The trial being now finished, the president shall demand of the jury, whether, in their judgment, the accusation be made out; and whether, if made out, it was accompanied with such or such qualifying circumstances? Where the accused is under sixteen

years of age, he shall further inquire, "whether the accused acted with discretion?—The jury then retire to deliberate; and no sooner do they arrive in the chamber appropriated for them, than the foreman is required to read over to them a prepared formula; or lecture, instructing them in their duties; with which, we think, they ought to have been familiar before the trial began, and of which the recapitulation, if it engage their attention at such a moment, will be too likely to drive all the facts of the trial from their memory.

Unanimity is not required in the verdict: if the jury be equally divided in opinion, the accused is acquitted: if they condemn by a bare majority, that circumstance is to be notified to the judges, who then deliberate on the case, and if the majority of the judges agree with the minority of the jury, so that more than one half of the persons composing the court are in favour of the prisoner's innocence, he is acquitted. When he is duly convicted, if the judges are unanimously of opinion that the jury were wrong, they may award a new trial at the following assize. The first verdict must be suppressed, and a new jury required to pronounce on the facts. This revision must be instituted by the court itself, spontaneously *ex officio*, and without the extraneous application; and it cannot take place when the accused is pronounced *not guilty*. The right of appeal, to be exercised within ten days, is also conferred on the defendant who has been found guilty.

In determining the mode of forming and convoking the jury, the French law points out the sources from which that body may be drawn, and mentions that it shall be composed of "citizens who have attained thirty years of age, enjoying political and civil rights, and offering the best guarantee by their functions, their profession, their knowledge, and their fortune." These are the words used by the counsellors of state, in addressing the legislative body; the law itself requires that jurymen shall be taken, 1, From the members of the electoral colleges; 2, From the three hundred householders of the department who pay the most taxes; 3, From the functionaries of the administrative order, according to the nomination of the emperor; 4, From the doctors and licentiates of one or of several of the four professions, of law, medicine, the sciences, and the belles lettres, the members and

correspondents of the institute, and of the other learned societies, which are recognized by the government; 5, From the notaries; 6, From the bankers, brokers, agents, and merchants of one of the first classes; 7 From those who are employed by the several administrations, having an income of at least 4000 francs. An Englishman would, perhaps, look with some jealousy at a groupe which included so much civil intercourse with government, and would believe, notwithstanding all the intellectual refinement that appears to be introduced into the system, from the literary bodies enumerated in the list, that an equal portion of plain and upright good sense, the great standard characteristic of a jury, might be drawn from the mass of freeholders of a certain value.

A still greater cause for suspicion exists in the appointment of the jury-lists by the prefect, the immediate and permanent officer of the crown, and in the promise held forth by the emperor, to reward such jurymen as shall be reported to him by the several judges to be peculiarly deserving of his imperial favour. This most gracious promise is, however, less mischievous than it might be, for a reason which proves the institution itself of juries to be useless in all the great political purposes for which we are accustomed to admire and revere it; viz. *that juries are not to be permitted to take cognizance of any political offences whatsoever*. Special commissions for these and other crimes are authorized to be appointed, as occasion may require:—but our attention must be more particularly confined to the ordinary course of justice, and even of this we have already professed our inability to pursue all the details. The last title of the code is devoted to “certain objects affecting the publick interest and the general security,” and comprizes five chapters:—On the mode of preserving the records of judgment; On prisons, houses of detention, and of justice: On the means of securing individual liberty against illegal detention or other arbitrary acts; On the *rehabilitation* of the condemned, on which article we shall speak presently, and On prescription, which here signifies the time limited for the commencement of prosecutions in various cases.

The enactments relating to the several sorts of prisons do not appear to include any matter worthy of observation: indeed, they are rather deficient in prescribing regulations for preserving the

cleanliness and promoting the health, the morals, and the decent deportment of the prisoners; requiring the judge to visit the places of confinement not more frequently than once in a month, and placing the police of them, in general terms, under the superintendence of certain magistrates. Laborious occupations are not enjoined. The difficult problem of reconciling the government of a prison with humanity and justice, receives no attempt at a solution, since, while the keeper is invested with the power of close and solitary imprisonment in irons, to restrain and punish his subjects, when mutinous, they have no specifick remedy against his violence and tyranny, nor any legal mode of even making known their grievances to those who might redress them. The means by which personal liberty is secured against illegal *arrests*, depends rather on former laws than any part of the system now promulgated.

By the *rehabilitation* of a convict is understood his restoration to all the rights and privileges which he had forfeited by being subjected to painful or infamous punishment. He cannot demand it until five years have elapsed since the execution of his sentence, during the whole of which time he must have resided in the same *arrondissement*; nor unless he has been domiciled two complete years in the territory of the municipality to which the demand is addressed. It must also be supported by testimonials to his good conduct from the municipal authorities. The Criminal Court receives the demand and pronounces on it at the end of three months; if their judgment be unfavourable, the application may be renewed at the end of five years, with the same advantage: but if the party re-admitted into society should offend again, he becomes incapacitated forever.—We are disposed to applaud the policy and the generosity of the principle which has created this institution, though it seems to have been carried into effect with too much coldness. The term of five years ought to be, under certain circumstances, susceptible of abridgment, and some particular actions, independently of a long series of good behaviour, might be properly allowed to effect the restoration of the person performing them. Surely, for example, the convict who has saved the life of a drowning citizen, at the hazard of his own, might receive the most acceptable token of gratitude from

that society of which he has preserved a member, by being himself re-instated in its benefits.

The concluding chapter embraces a subject which has no place, we believe, in the criminal law of England; we mean *prescription*, or, as it is with us styled, in civil cases, *limitation*. In all capital offences, or those which are visited by painful or infamous judgment, no prosecution shall be instituted, nor action brought after ten years from the period of committing the crime. In smaller violations of law, and in cases which fall under the cognizance of the police, shorter terms are prescribed. The policy of this law, which is a modification of certain ancient regulations that prevailed under the old government of France, is not perfectly obvious to our minds. The only reason that can well be supposed to exist, for the delay of accusations, is a suspension of the power of producing evidence, which may, perhaps, afterwards be obtained: but why should it not be the groundwork of a trial, whenever it is discovered? A complication of unforeseen circumstances may bring to light a murder, accompanied by concealment of the body, at a much greater distance of time than ten years. An act of forgery may lie dormant for very many years, till the complaints and suspicions of some person, whose remote interests have been defrauded, trace it home to the delinquent. The ten years' absence of witnesses might be the result of inevitable accident, or it might be purchased by a rich criminal, or forced by a desperate offender. These appear to be solid objections to the law of proscription, and the only arguments offered in favour of it have so much declamation in them, that they will awaken distrust in minds which are habituated to legal reasoning. M. Real, the government-orator, in presenting the project to the legislative body, exclaims, that the prescription is in itself a punishment, in the horrible fear, which deprives the criminal of his safety by day and his repose by night; and M. Louvet, in his statement of the report from the committee, asks, whether the *publick vengeance* destined to repress the resentment of individuals, should be itself interminable? Without offering any defence of vengeance, either publick or private, it may be well doubted, whether it be for the safety of society that the period may arrive, at which the most enormous guilt shall be made manifest to the conviction of all mankind, and yet shall go unpunished.

We must not close this volume without remarking, that the incense offered in it to his imperial majesty is so extremely profuse as to prove that the "increase of appetite has grown with what it feeds on," in the enjoyment of flattery, which the mind of Napoleon appears to feel. As well in the *motives* with which the code is ushered in, as in the *reports* by which its several parts are sanctioned, the counsellors of state and the legislators appear to deem it quite sufficient to adduce the opinion of "the Genius of France," the "first of conquerours and of legislators," in support of any disputable position. These pieces are, therefore, more curious in the history which they present of the progress of reformation in the law, than valuable for the free discussion of important principles; and they are often too declamatory for a statement of the elements of legal science. They are, however, and so is the code to which they relate, well worthy of consideration for our English legislators, to whom they will exhibit some particulars that deserve their adoption, and, at the same time, such a general system of administration as will not be likely to diminish their veneration for the existing jurisprudence of their own country.

SERGEANT HALL, Printer,
Baltimore.

TO THE READER.

The Printer of the present No. of the American Law Journal apologizes to the reader for the errors which have occurred in its progress through the Press, particularly in the paging of the initial sheets. The Editor and Printer being absent on military duty, the work was unavoidably neglected, to the regret and eventually to the mortification of both. The same remark applies to the impression. It is hoped that the reader will impute these blemishes to their true cause—the turbulence of the times.

Baltimore, May 26, 1813.

ERRATA.

The first 16 pages are erroneously numbered. The paging should have been continued from the former No., so as to read 169, &c. The same error occurs at page 231, which should be 233, and continues through the 7 ensuing pages.—Page 201, eight lines from the foot of the page, for *sit* read *stat*.—Page 222, l. 10, in some copies, for *crudus* read *rudis*.

THE
AMERICAN LAW JOURNAL.

COMMENTARIES

ON THE CONSTITUTION OF THE UNITED STATES
OF AMERICA.

[The debates of the legislature of Pennsylvania on the Constitution of the United States were taken in short hand, at the time, by T. Lloyd. We have extracted from his publication the observations of judges Wilson and M'Kean,—the former one of the associate justices in the Supreme Court of the United States, and the latter, for many years, chief justice, and afterwards governor of the state of Pennsylvania.]

THE convention of the people of the state of Pennsylvania being duly organized on the 21st of November, 1787, proceeded to the consideration of the new constitution proposed by the convention of delegates from twelve of the thirteen United States, for the acceptance of the people of the individual states; and on the 26th, having read that instrument twice over, a debate commenced, from which are extracted the following speeches, forming, as it were, a complete comment and dissertation upon the subject of a republican form of government.

It may, however, not be amiss in us to remark, previous to entering on our extracts, that the opponents to the new system of government* were urgent in stating immediately their objections, which were reducible to the following points:

* Mr. Findley, Mr. Smille, and Mr. Whitehill.

There is no declaration of rights in this constitution, and the laws of the general government being paramount to the laws and constitutions of the several states, the declarations of rights in the several state-constitutions are no security, nor are the people secured even in the enjoyment of the benefits of the common law.

Owing to the small number of members in the House of Representatives, there is not the substance but the shadow only of representation, which can never produce proper information in the Legislature, or inspire confidence in the people—the laws will therefore be generally made by men little concerned in, and unacquainted with, their effects and consequences.

The Senate have the power of altering all money-bills, and of originating appropriations of money, although they are not the immediate representatives of the people, or amenable to them. These and their other great powers, viz. their power in the appointment of ambassadors, and all publick officers, in making treaties, and trying all impeachments, their influence upon, and connection with, the supreme executive. From these circumstances, their duration of office, and their being a constant existing body, almost continually sitting, joined with their being one complete branch of the Legislature, will destroy any and every balance in the government, and enable them to accomplish what usurpation they please upon the rights and liberties of the people.

The judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several states, thereby rendering law as *tedious, intricate and expensive* and justice as *unattainable*, by a great part of the community, as in *England*, and enabling the rich to oppress and ruin the poor.

The President of the United States has no constitutional council—a thing unknown in any safe and regular government—he will, therefore, be unsupported by proper information and advice, and will generally be directed by minions and favourites, or he will become a tool to the Senate, or a council of state will grow out of the principal officers of the great departments, the worst and most dangerous of all ingredients for such a council, in a free country; for they may be induced to join in any dangerous or oppressive measures to shelter themselves and prevent an inquiry into their own misconduct in office: whereas, had a

constitutional council been formed, as was said to have been proposed, of six members, viz. two from the eastern, two from the middle, and two from the southern states, to be appointed by vote of the states in the House of Representatives, with the same duration and rotation of office as the Senate, the executive would always have had proper information and advice; the President of such a council might have acted as Vice-President of the United States, *pro tempore*, upon any vacancy or disability of the chief magistrate, and the long-continued sessions of the senate would, in a great measure, have been prevented. From this fatal defect of a constitutional council has arisen the improper power of the Senate in the appointment of publick officers, and the alarming dependence and connection between that branch of the Legislature and the executive. Hence also sprung that unnecessary and dangerous office of Vice-President, who, for want of other employment, is made President of the Senate, thereby dangerously blending the legislative and executive powers; besides always giving to some one of the states an unnecessary and unjust pre-eminence over the others.

The President of the United States has the unrestrained power of granting pardon for treasons, which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent the discovery of his own guilt.

By declaring all treaties supreme laws of the land, the executive and Senate have, in many cases, an exclusive power of legislation, which might have been avoided by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety.

Under their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce—constitute new crimes—inflict unusual and severe punishments, and extend their power as far as they shall think proper—so that the state legislatures have no security for the powers now presumed to remain to them, or the people for their rights.

There is no declaration for preserving the liberty of the press, the trial by jury in civil causes, nor against the danger of standing armies in time of peace.

Mr. M'KEAN said, there was an indiscreet haste in running so immediately into the particular examination of the several parts of the system; although he admitted that the subject generally was fully and fairly before them. Our first object, Mr. President, said he, must be, to ascertain the proper mode of proceeding to obtain a final decision. We are without precedent to guide us; yet those forms, observed by other publick bodies, so far as they are eligible, may generally be proper for us to adhere to. So far, therefore, as the rules of the Legislature of Pennsylvania apply with convenience to our circumstance, I acquiesce in their adoption.

I now think it necessary, Sir, to make you a motion, not that I apprehend it can be determined until a full investigation of the subject before us has taken place. This motion will be, Sir,—That this convention do *assent to* and *ratify* the constitution agreed to on the 17th of September last, by the convention of the United States of America, held at Philadelphia.

Upon this motion being seconded, Sir, the consideration of the constitution will be necessarily drawn on. Every objection that can be suggested against the work will be listened to with attention, answered, and perhaps obviated. And finally, after a full discussion, the ground will be ascertained, on which we are to receive or reject the system now before you. I do not wish this question to be decided to-day, though, perhaps, it may be determined this day week. I offer you this for the sake of form, and shall hereafter trouble you with another motion, that may bring the particular parts of this constitution before you, for a regular and satisfactory investigation.

In this motion, Mr. M'Kean was seconded by Mr. Allison.

Mr. WILSON.—The system proposed by the late convention, for the government of the United States, is now before you. Of that convention I had the honour to be a member. As I am the only member of that body who have the honour to be also a member of this, it may be expected that I should prepare the way for the deliberations of this assembly, by unfolding the difficulties which the late convention were obliged to encounter; by pointing out the end which they proposed to accomplish, and by tracing

the general principles which they have adopted for the accomplishment of that end.

To form a good system of government for a single city or state, however limited as to territory, or inconsiderable as to numbers, has been thought to require the strongest efforts of human genius. With what conscious diffidence, then, must the members of the convention have revolved in their minds the immense undertaking which was before them. Their views could not be confined to a small or a single community, but were expanded to a great number of states, several of which contain an extent of territory, and resources of population, equal to those of some of the most respectable kingdoms on the other side of the Atlantick. Nor were even these the only objects to be comprehended within their deliberations. Numerous states yet unformed; myriads of the human race, who will inhabit regions hitherto uncultivated, were to be affected by the result of their proceedings. It was necessary, therefore, to form their calculations on a scale commensurate to a large portion of the globe.

For my own part, I have been often lost in astonishment at the vastness of the prospect before us. To open the navigation of a single river was lately thought, in Europe, an enterprize adequate to imperial glory. But could the commercial scenes of the Scheldt be compared with those that, under a good government, will be exhibited on the Hudson, the Delaware, the Potowmack, and the numerous other rivers that water and are intended to enrich the dominions of the United States?

The difficulty of the business was equal to its magnitude. No small share of wisdom and address is requisite to combine and reconcile the jarring interests that prevail, or seem to prevail, in a single community. The United States contain already thirteen governments mutually independent. Those governments present to the Atlantick a front of fifteen hundred miles in extent. Their soil, their climates, their productions, their dimensions their numbers are different. In many instances, a difference, and even an opposition subsists among their interests: and a difference and even an opposition is imagined to subsist in many more. An apparent interest produces the same attachment as a real one, and is often pursued with no less perseverance and vigour. When all these circumstances are seen and attentively considered, will

any member of this honourable body be surprized, that such a diversity of things produced a proportioned diversity of sentiment? Will he be surprized that such a diversity of sentiment rendered a spirit of mutual forbearance and conciliation indispensably necessary to the success of the great work? And will he be surprized, that mutual concessions and sacrifices were the consequences of mutual forbearance and conciliation? When the springs of opposition were so numerous and strong, and poured forth their waters in courses so varying, need we be surprized that the stream formed by their conjunction was impelled in a direction somewhat different from that which each of them would have taken separately?

I have reason to think that a difficulty arose in the minds of some members of the convention from another consideration, their ideas of the temper and disposition of the people, for whom the constitution is proposed. The citizens of the United States, however different in some other respects, are well known to agree in one strongly marked feature of their character—a warm and keen sense of freedom and independence. This sense has been heightened by the glorious result of their late struggle against all the efforts of one of the most powerful nations of Europe. It was apprehended, I believe, by some, that a people so highly spirited, would ill brook the restraints of an efficient government. I confess that this consideration did not influence my conduct. I knew my constituents to be high spirited, but I knew them also to possess sound sense. I knew that, in the event, they would be best pleased with that system of government, which would best promote their freedom and happiness. I have often revolved this subject in my mind. I have supposed one of my constituents to ask me, why I gave such a vote on a particular question? I have always thought it would be a satisfactory answer to say, because I judged, upon the best consideration I could give, that such a vote was right. I have thought that it would be but a very poor compliment to my constituents to say—that, in my opinion, such a vote would have been proper, but that I supposed a contrary one would be more agreeable to those who sent me to the convention. I could not, even in idea, expose myself to such a retort, as, upon the last answer, might have been justly made to me. Pray, Sir, what reasons have you for

supposing that a right vote would displease your constituents? is this the proper return for the high confidence they have placed in you? If they have given cause for such a surmise, it was by choosing a representative, who could entertain such an opinion of them. I was under no apprehension that the good people of this state would behold, with displeasure, the brightness of the rays of delegated power, when it only proved the superior splendour of the luminary, of which those rays were only the reflection.

A very important difficulty arose from comparing the extent of the country to be governed, with the kind of government which it would be proper to establish in it. It has been an opinion, countenanced by high authority, "that the natural property of small states is to be governed as a republick; of middling ones, to be subject to a monarch; and of large empires, to be swayed by a despotick prince; and that the consequence is, that, in order to preserve the principles of the established government, the state must be supported in the extent it has acquired; and that the spirit of the state will alter in proportion as it extends or contracts its limits." (Montesquieu, b. 8, c. 20.) This opinion seems to be supported, rather than contradicted, by the history of the governments in the old world. Here then the difficulty appeared in full view. On one hand, the United States contain an immense extent of territory, and, according to the foregoing opinion, a despotick government is best adapted to that extent. On the other hand, it was well known, that, however the citizens of the United States might, with pleasure, submit to the legitimate restraints of a republican constitution, they would reject, with indignation, the fetters of despotism. What then was to be done? The idea of a confederate republick presented itself. This kind of constitution has been thought to have "all the internal advantages of a republican, together with the external force of a monarchical government." (Montesquieu, b. 9, c. 1. 2: Paley, 199. 202.)

Its description is, "a convention, by which several states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a *new one*, capable of increasing by means of farther association." (Montesquieu, b. 9. c. 1.) The *expanding* quality of such a government is peculiarly fitted for the United States, the greatest part of whose territory is yet uncultivated

But while this form of government enabled us to surmount the difficulty last mentioned, it conducted us to another, of which I am now to take notice. It left us almost without precedent or guide; and consequently, without the benefit of that instruction, which, in many cases, may be derived from the constitution, and history and experience of other nations. Several associations have frequently been called by the name of confederate states, which have not, in propriety of language, deserved it. The Swiss Cantons are connected only by alliances. The United Netherlands are indeed an assemblage of societies; but this assemblage constitutes *no new one*; and, therefore, it does not correspond with the full definition of a confederate republick. The Germanick body is composed of such disproportioned and discordant materials, and its structure is so intricate and complex, that little useful knowledge can be drawn from it. Ancient history discloses, and barely discloses to our view, some confederate republicks—the Achæan league—the Lycian confederacy, and the Amphyctyonick council. But the facts recorded concerning their constitutions are so few and general, and their histories are so unmarked and defective, that no satisfactory information can be collected from them concerning many particular circumstances, for an accurate discernment and comparison of which alone, legitimal and practical inferences can be made from one constitution to another. Besides, the situation and dimensions of those confederacies, and the state of society, manners and habits in them, were so different from those of the United States, that the most correct descriptions could have supplied but a very small fund of applicable remark. Thus, in forming this system, we were deprived of many advantages, which the history and experience of other ages and other countries would, in other cases, have afforded us.

Permit me to add, in this place, that the science even of government itself, seems yet to be almost in its state of infancy. Governments, in general, have been the result of force, of fraud, and of accident. After a period of six thousand years has elapsed since the creation, the United States exhibit to the world, the first instance, as far as we can learn, of a nation, unattacked by external force, unconvulsed by domestick insurrections, assembling voluntarily, deliberating fully, and deciding calmly. concerning

that system of government, under which they would wish that they and their posterity should live. The ancients, so enlightened on other subjects, were very uninformed with regard to this. They seem scarcely to have had any idea of other kinds of government, than the three simple forms designated by the epithets monarchical, aristocratical and democratical. I know that much and pleasing ingenuity has been exerted, in modern times, in drawing entertaining parallels between some of the ancient constitutions and some of the mixed governments that have since existed in Europe. But I much suspect that, on strict examination, the instances of resemblance will be found to be few and weak; to be suggested by the improvements, which, in subsequent ages, have been made in government, and not to be drawn immediately from the ancient constitutions themselves, as they were intended and understood by those who framed them. To illustrate this, a similar observation may be made on another subject. Admiring criticks have fancied that they have discovered in their favourite *Homer* the seeds of all the improvements in philosophy and in the sciences, made since his time. What induces me to be of this opinion is, that *Tacitus*—the profound politician Tacitus—who lived towards the latter end of those ages, which are now denominated ancient, who had undoubtedly studied the constitutions of all the states and kingdoms known before and in his time; and who certainly was qualified, in an uncommon degree, for understanding the full force and operation of each of them, considers, after all he had known and read, a mixed government, composed of the three simple forms, as a thing rather to be wished than expected: And he thinks, that if such a government could even be instituted, its duration could not be long. One thing is very certain, that the doctrine of representation in government was altogether unknown to the ancients. Now the knowledge and practice of this doctrine is, in my opinion, essential to every system, that can possess the qualities of freedom, wisdom and energy.

It is worthy of remark, and the remark may, perhaps, excite some surprise; that representation of the people is not, even at this day, the sole principle of any government in Europe. Great Britain boasts, and she may well boast, of the improvements she has made in politicks, by the admission of representation: for

the improvement is important as far as it goes; but it by no means goes far enough. Is the executive power of Great Britain founded on representation? This is not pretended. Before the revolution many of the kings claimed to reign by divine right, and others by hereditary right; and even at the revolution, nothing farther was effected or attempted, than the recognition of certain parts of an original contract,* supposed, at some former remote period, to have been made between the king and the people. A contract seems to exclude, rather than to imply, delegated power. The judges of Great Britain are appointed by the crown. The judicial authority, therefore, does not depend upon representation, even in its most remote degree. Does representation prevail in the legislative department of the British government? Even here it does not predominate; though it may serve as a check. The legislature consists of three branches, the king, the lords, and the commons. Of these only the latter are supposed by the constitution to represent the authority of the people. This short analysis clearly shows to what a narrow corner of the British constitution the principle of representation is confined. I believe it does not extend further, if so far, in any other government in Europe. For the American states, were reserved the glory and happiness of diffusing this vital principle throughout the constituent parts of government. Representation is the chain of communication between the people, and those, to whom they have committed the exercise of the powers of government. This chain may consist of one or more links; but in all cases it should be sufficiently strong and discernable.

To be left without guide or precedent was not the only difficulty, in which the convention were involved, by proposing to their constituents a plan of a confederate republick. They found themselves embarrassed with another of peculiar delicacy and importance; I mean that of drawing a proper line between the national government, and the government of the several states. It was easy to discover a proper and satisfactory principle on the subject. Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation or effect be-

yeard the bounds of a particular state, should be considered as belonging to the United States; but though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty; because in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen, or remove the difficulty, arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care. It is only in mathematical sciences that a line can be described with mathematical precision. But I flatter myself that upon the strictest investigation, the enumeration will be found to be safe and unexceptionable; and accurate too in as great a degree as accuracy can be expected in a subject of this nature. Particulars under this head will be more properly explained, when we descend to the minute view of the enumeration, which is made in the proposed constitution.

After all, it will be necessary, that, on a subject so peculiarly delicate as this, much prudence, much candour, much moderation and much liberality should be exercised and displayed both by the federal government, and by the governments of the several states. It is to be hoped, that those virtues in government will be exercised and displayed, when we consider, that the powers of the federal government and those of the state governments are drawn from sources equally pure. If a difference can be discovered between them, it is in favour of the federal government, because that government is founded on a representation of the *whole* union; whereas the government of any particular state is founded only on the representation of a part, inconsiderable when compared with the whole. Is it not more reasonable to suppose, that the counsels of the whole will embrace the interest of every part, than that the counsels of any part will embrace the interest of the whole?

I intend not, Sir, by this description of the difficulties with which the convention were surrounded, to magnify their skill or their merit in surmounting them, or to insinuate that any predicament in which the convention stood, should prevent the closest and most cautious scrutiny into the performance, which they have exhibited to their constituents and to the world. My intention is

of far other and higher aim—to evince by the conflicts and difficulties which must arise from the many and powerful causes which I have enumerated, that it is hopeless and impracticable to form a constitution, which in every part, will be acceptable to every citizen, or even to every government in the United States; and that all which can be expected is, to form such a constitution as upon the whole, is the best that can possibly be obtained. Man and perfection!—a state and perfection!—an assemblage of states and perfection!—can we reasonably expect, however ardently we may wish to behold the glorious union?

I can well recollect, though I believe I cannot convey to others the impression, which, on many occasions, was made by the difficulties which surrounded and pressed the convention. The great undertaking, at some times, seemed to be at a stand, at other times, its motion seemed to be retrograde. At the conclusion, however, of our work, many of the members expressed their astonishment at the success with which it terminated.

Having enumerated some of the difficulties, which the convention were obliged to encounter in the course of their proceedings, I shall next point out the end, which they proposed to accomplish. Our wants, our talents, our affections, our passions, all tell us that we were made for a state of society. But a state of society could not be supported long or happily without some civil restraint. It is true, that, in a state of nature, any one individual may act uncontrollable by others; but it is equally true, that in such a state, every other individual may act uncontrolled by him. Amidst this universal independence, the dissensions and animosities between interfering members of the society, would be numerous and ungovernable. The consequence would be, that each member, in such a natural state, would enjoy less liberty, and suffer more interruption, than he would in a well regulated society. Hence the universal introduction of governments of some kind or other into the social state. The liberty of every member is increased by this introduction; for each gains more by the limitation of the freedom of every other member, than he loses by the limitation of his own. The result is, that civil government is necessary to the perfection and happiness of man. In forming this government, and carrying it into execution, it is *essential* that the *interest* and *authority* of the whole community should be binding in every part of it.

The foregoing principles and conclusions are generally admitted to be just and sound with regard to the nature and formation of single governments, and the duty of submission to them. In some cases they will apply, with much propriety and force, to states already formed. The advantages and necessity of civil government among individuals in society, are not greater or stronger than, in some situations and circumstances, are the advantages and necessity of a federal government among states. A natural and a very important question presents itself—is such the situation—are such the circumstances of the United States? A proper answer to this question will unfold some very interesting truths.

The United States may adopt any one of four different systems. They may become consolidated into one government, in which the separate existence of the states shall be entirely absorbed. They may reject any plan of union or association, and act as separate and unconnected states. They may form two or more confederacies. They may unite in one federal republic. Which of these systems ought to have been formed by the convention? To support, with vigour, a single government over the whole extent of the United States, would demand a system of the most unqualified and the most unremitted despotism.—Such a number of separate states, contiguous in situation, unconnected and disunited in government, would be, at one time, the prey of foreign force, foreign influence and foreign intrigue; at another, the victim of mutual rage, rancour and revenge. Neither of these systems found advocates in the late convention: I presume they will not find advocates in this. Would it be proper to divide the United States into two or more confederacies? It will not be unadvisable to take a more minute survey of this subject. Some aspects, under which it may be viewed, are far from being, at first sight, uninviting. Two or more confederacies would be each more compact and manageable than a single one extending over the same territory. By dividing the United States into two or more confederacies, the great collision of interests, apparently, or really different and contrary, in the *whole extent* of their dominion, would be broken, and, in a great measure, disappear in the several parts. But these advantages, which are discovered from certain points of view, are greatly overbalanced by incon-

vaniences that will appear on a more accurate examination. Animosities, and, perhaps wars, would arise from assigning the extent, the limits, and the rights of the different confederacies. The expenses of governing would be multiplied by the manner of federal governments. The danger resulting from foreign influence and mutual dissensions would not, perhaps, be less great and alarming in the instance of different confederacies, than in the instance of different, though more numerous, unassociated states. These observations, and many others that might be made on the subject, will be sufficient to evince, that a division of the United States into a number of separate confederacies, would probably be an unsatisfactory and an unsuccessful experiment. The remaining system which the American states may adopt, is a union of them under one confederate republic. It will not be necessary to employ much time, or many arguments to show, that this is the most eligible system that can be proposed. By adopting this system, the vigour and decision of a wide spreading monarchy may be joined to the freedom and beneficence of a contracted republic. The extent of territory, the diversity of climate and soil, the number, and greatness, and connection of lakes and rivers, with which the United States are intersected and almost surrounded, all indicate an enlarged government to be fit and advantageous for them. The principles and dispositions of their citizens, indicate that in this government, liberty shall reign triumphant. Such indeed have been the general opinions and wishes entertained since the era of independence. If those opinions and wishes are well founded as they have been general, the late convention were justified in proposing to their constituents, *one* confederate republic, as the best system of a national government for the United States.

In forming this system, it was proper to give minute attention to the interest of all the parts; but there was a duty of still higher import—to feel and to show a predominating regard to the superior interests of the whole. If this great principle had not prevailed, the plan before us would never have made its appearance. The same principle that was so necessary in forming it, is equally necessary in our deliberations, whether we should reject or ratify it.

I make these observations with a design to prove and illustrate this great and important truth—that in our decisions on the work of the late convention, we should not limit our views and regards to the state of Pennsylvania. The aim of the convention was to form a system of good and efficient government on the more extensive scale of the United States. In this, and in every other instance, the work should be judged with the same spirit, with which it was performed. A principle of duty as well as candour demands this.

We have remarked, that civil government is necessary to the perfection of society: we now remark that civil liberty is necessary to the perfection of civil government. Civil liberty is natural liberty itself, divested only of that part, which, placed in the government, produces more good and happiness to the community, than if it had remained in the individual. Hence it follows, that civil liberty, while it resigns a part of natural liberty, retains the free and generous exercise of all the human faculties, so far as it is compatible with the publick welfare.

In considering and developing the nature and end of the system before us, it is necessary to mention another kind of liberty, which has not yet, as far as I know, received a name. I shall distinguish it by the appellation of *federal liberty*. When a single government is instituted, the individuals, of which it is composed, surrender to it a part of their natural independence, which they before enjoyed as men. When a confederate republic is instituted, the communities, of which it is composed, surrender to it a part of their political independence, which they before enjoyed as states. The principles, which directed, in the former case, what part of the natural liberty of the man ought to be given up, and what part ought to be retained, will give similar directions in the latter case. The states should resign, to the national government, that part, and that part only, of their political liberty, which placed in that government, will produce more good to the whole, than if it had remained in the several states. While they resign this part of their political liberty, they retain the free and generous exercise of all their other faculties as states, so far as it is compatible with the welfare of the general and superintending confederacy.

Since *states* as well as *citizens* are represented in the constitution before us, and form the objects on which that constitution is proposed to operate, it was necessary to notice and define *federal* as well as *civil* liberty.

These general reflections have been made, in order to introduce, with more propriety and advantage, a practical illustration of the end proposed to be accomplished by the late convention.

It has been too well known—it has been too severely felt—that the present confederation is inadequate to the government and to the exigencies of the United States. The great struggle for liberty in this country, should it be unsuccessful, will probably be the last one which she will have for her existence and prosperity, in any part of the globe. And it must be confessed, that this struggle has, in some of the stages of its progress, been attended with symptoms, that foreboded no fortunate issue. To the iron hand of tyranny, which was lifted up against her, she manifested, indeed, an intrepid superiority. She broke in pieces the fetters, which were forged for her, and showed, that she was unassailable by force. But she was environed with dangers of another kind, and springing from a very different source. While she kept her eye steadily fixed on the efforts of oppression, licentiousness was secretly undermining the rock on which she stood.

Need I call to your remembrance the *contrasted* scenes, of which we have been witnesses? On the glorious conclusion of our conflict with Britain, what high expectations were formed concerning us by others! what high expectations did we form concerning ourselves! Have those expectations been realized?—no. What has been the cause? Did our citizens lose their perseverance and magnanimity?—no. Did they become insensible of resentment and indignation at any high-handed attempt, that might have been made to injure or enslave them?—no. What then has been the cause? The truth is, we dreaded danger only on one side: This we manfully repelled. But on another side, danger, not less formidable, but more insidious, stole in upon us; and our unsuspecting tempers were not sufficiently attentive, either to its approach or to its operations. Those, whom foreign strength could not overpower, have well nigh become the victims of internal anarchy.

If we become a little more particular, we shall find that the foregoing representation is by no means exaggerated. When we had baffled all the menaces of foreign power, we neglected to establish among ourselves a government, that would ensure domestic vigour and stability. What was the consequence? the commencement of peace was the commencement of every disgrace and distress, that could befall a people in a peaceful state. Devoid of national power, we could not prohibit the extravagance of our importations, nor could we derive a revenue from their excess. Devoid of national importance, we could not procure for our exports, a tolerable sale at foreign markets. Devoid of national credit, we saw our public securities melt in the hands of the holders, like snow before the sun. Devoid of national dignity, we could not, in some instances, perform our treaties, on our parts; and, in other instances, we could neither obtain nor compel the performance of them on the part of others. Devoid of national energy, we could not carry into execution our own resolutions, decisions or laws.

Shall I become more particular still? The tedious detail would disgust me: nor is it now necessary. The years of langour are passed—We have felt the dishonor, with which we have been covered: we have seen the destruction, with which we have been threatened. We have penetrated to the causes of both, and when we have once discovered them, we have begun to search for the means of removing them. For the confirmation of these remarks, I need not appeal to an enumeration of facts. The proceedings of Congress, and of the several states, are replete with them. They all point out the weakness and insufficiency as the cause, and an *efficient* general government as the only cure of our political distempers.

Under these impressions, and with these views, was the late convention appointed; and under these impressions, and with these views, the late convention met.

We now see the great end which they propose to accomplish. It was to frame, for the consideration of their constituents, one federal and national constitution—a constitution, that would produce the advantages of good, and prevent the inconveniences of bad government—a constitution, whose beneficence and energy would pervade the whole union; and bind and embrace the inte-

rests of every part—a constitution, that would insure peace, freedom and happiness, to the states and people of America.

We are now naturally led to examine the means, by which they proposed to accomplish this end. This opens more particularly to our view the important discussion before us. But previously to our entering upon it, it will not be improper to state some general and leading principles of government, which will receive particular applications in the course of our investigations.

There necessarily exists in every government a power, from which there is no appeal; and which, for that reason, may be termed supreme, absolute and uncontrollable. Where does this power reside? To this question, writers on different governments will give different answers. Sir William Blackstone will tell you, that in Britain, the power is lodged in the British Parliament, that the Parliament may alter the form of the government; and that its power is absolute without control. The idea of a constitution, limiting and superintending the operations of a legislative authority, seems not to have been accurately understood in Britain. There are, at least, no traces of practice, conformable to such a principle. The British constitution is just what the British Parliament pleases. When the Parliament transferred legislative authority to Henry VIII. the act transferring could not in the strict acception of the term, be called unconstitutional.

To control the power and conduct of the legislature by an over-ruling constitution, was an improvement in the science and practice of government, reserved to the American states.

Perhaps some politician, who has not considered, with sufficient accuracy, our political systems, would answer, that in our governments, the supreme power was vested in the constitutions. This opinion approaches a step nearer to the truth; but does not reach it. The truth is, that, in our governments, the supreme, absolute and uncontrollable power remains in the people. As our constitutions are superior to our legislatures; so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess, over our constitutions, control in *act*, as well as in right.

The consequence is, that the people may change the constitutions, whenever, and however they please. This is a right, of which no positive institution can ever deprive them.

These important truths, Sir, are far from being merely speculative : we, at this moment, speak and deliberate under their immediate and benign influence. To the operation of these truths, we are to ascribe the scene, hitherto unparalleled, which America now exhibits to the world—a gentle, a peaceful, a voluntary and a deliberate transition from one constitution of government to another. In other parts of the world, the idea of revolutions in government is, by a mournful and an indissoluble association, connected with the idea of wars, and all the calamities attendant on wars. But happy experience teaches us to view such revolutions in a very different light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and mankind.

Oft have I viewed, with silent pleasure and admiration, the force and prevalence, of this principle through the United States, that the supreme power resides in the people ; and that they never part with it. It may be called the *panacea* in politicks. There can be no disorder in the community but may here receive a radical cure. If the error be in the legislature, it may be corrected by the constitution : if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in government ; if the people are not wanting to themselves. For a people wanting to themselves, there is no remedy : From their power, as we have seen, there is no appeal : to their error, there is no superior principle of correction.

There are three simple species of government—monarchy, where the supreme power is in a single person—aristocracy, where the supreme power is in a select assembly, the members of which either fill up, by election, the vacancies in their own body ; or succeed to their places in it by inheritance, property, or in respect of some *personal* right or qualification—a republic or democracy, where the people at large *retain* the supreme power, and act either collectively or by representation.

Each of these species of government has its advantages and disadvantages.

The advantages of a monarchy are strength, despatch, secrecy, unity of counsel. Its disadvantages are—Tyranny, expense, ignorance of the situation and wants of the people, insecurity, unnecessary wars, evils attending elections or successions.

The advantages of aristocracy are—Wisdom, arising from experience and education. Its disadvantages are—Dissentions among themselves, oppression to the lower orders.

The advantages of democracy are—Liberty, equal, cautious and salutary laws, publick spirit, frugality, peace, opportunities of exciting and producing abilities of the best citizens. Its disadvantages are dissentions, the delay and disclosure of publick counsels, the imbecility of publick measures retarded by the necessity of a numerous consent.

A government may be composed of two or more of the simple forms above-mentioned. Such is the British government. It would be an improper government for the United States; because it is inadequate to such an extent of territory; and because it is suited to an establishment of different orders of men. A more minute comparison between some parts of the British constitution and some parts of the plan before us, may perhaps find a proper place in a subsequent period of our business.

What is the nature and kind of that government, which has been proposed for the United States, by the late convention? In its principle, it is purely democratical: but that principle is applied in different forms, in order to obtain the advantages, and exclude the inconveniencies of the simple modes of government.

If we take an extended and accurate view of it, we shall find the streams of power running in different directions, in different dimensions, and at different heights, watering, adorning and fertilizing the fields and meadows, through which their courses are led; but if we trace them, we shall discover, that they all originally flow from one abundant fountain.

IN THIS CONSTITUTION, *all authority is derived from the PEOPLE.*

Fit occasion will hereafter offer for particular remarks on the the different parts of the plan. I have now to ask pardon of the house for detaining them so long.

Wednesday, October 28, 1787, A. M.

MR. WILSON.—This will be a proper time for making an observation or two, on what may be called the preamble to this constitution. I had occasion, on a former day, to mention that the leading principle in politicks, and that which pervades the American con-

stitutions, is, that the supreme power resides in the people; this constitution, Mr. President, opens with a solemn and practical recognition of that principle; "*WE the PEOPLE of the United States* in order to form a more perfect union, establish justice, &c. DO ORDAIN AND ESTABLISH this constitution, for the United States of America." It is announced in their name, it receives its political existence from their authority—they ordain and establish. What is the necessary consequence?—Those who ordain and establish, have the power, if they think proper to repeal and annul.—A proper attention to this principle may, perhaps, give ease to the minds of some, who have heard much concerning the necessity of a bill of rights.

Its establishment, I apprehend, has more force, than a volume written on the subject—It renders this truth evident, that the people have a right to do what they please, with regard to the government. I confess, I feel a kind of pride, in considering the striking difference between the foundation, on which the liberties of this country are declared to stand in this constitution, and the footing on which the liberties of England are said to be placed. The magna charta of England is an instrument of high value to the people of that country. But, Mr. president, from what source does that instrument derive the liberties of the inhabitants of that kingdom?—Let it speak for itself.—The king says, "*we have given and granted* to all archbishops, bishops, abbots, priors, earls, barons, and to all the freemen of this our realm, these liberties following, to be kept in our kingdom of England forever." When this was assumed as the leading principle of that government, it was no wonder that the people were anxious to obtain bills of rights, and to take every opportunity of enlarging and securing their liberties. But, here, Sir, the fee-simple remains in the people at large, and, by this constitution, they do not part with it.

MR. WILSON.—I am called upon to give a reason, why the convention omitted to add a bill of rights to the work before you. I confess, Sir, I did think that in point of propriety, the honourable gentleman ought first to have furnished some reasons, to show such an addition to be necessary; it is natural to prove the affirmative of a proposition; and if he had established the

propriety of this addition, he might then have asked, why it was not made.

I cannot say, Mr. president, what were the reasons, of every member of that convention, for not adding a bill of rights; I believe the truth is, that such an idea never entered the mind of many of them. I don't recollect to have heard the subject mentioned, till within about three days of the time of our rising, and even then there was no direct motion offered for any thing of this kind.—I may be mistaken in this; but as far as my memory serves me, I believe it was the case. A proposition to adopt a measure, that would have supposed that we were throwing into the general government, every power not expressly reserved by the people, would have been spurned at, in that house, with the greatest indignation; even in a single government, if the powers of the people rest on the same establishment, as is expressed in this constitution, a bill of rights is by no means a necessary measure. In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous: whence comes this notion that in the United States there is no security without a bill of rights? Have the citizens of South Carolina no security for their liberties? they have no bill of rights. Are the citizens on the eastern side of the Delaware less free, or less secured in their liberties, than those on the western side? The state of New Jersey has no bill of rights.—The state of New York has no bill of rights.—The states of Connecticut and Rhode-Island have no bills of rights.—I know not whether I have exactly enumerated the states who have thought it unnecessary to add a bill of rights to their constitutions; but this enumeration, Sir, will serve to show by experience, as well as principle, that even in single governments, a bill of rights is not an essential or necessary measure.—But in a government, consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution, is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated, is presumed to be given. The consequence is, that an imperfect enumeration would throw all

implied power into the scale of the government; and the rights of the people would be rendered incomplete. On the other hand; an imperfect enumeration of the powers of government, reserves all implied power to the people; and, by that means the constitution becomes incomplete; but of the two it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government, is neither so dangerous, nor important, as an omission in the enumeration of the rights of the people.

Mr. president, as we are drawn into this subject, I beg leave to pursue its history a little further. The doctrine and practice of declarations of rights have been borrowed from the conduct of the people of England, on some remarkable occasions; but the principles and maxims, on which their government is constituted, are widely different from those of ours. I have already stated the language of magna charta. After repeated confirmations of that instrument, and after violations of it, repeated equally often the next step taken in this business, was, when the petition of rights was presented to Charles the first.

It concludes in this manner, "all of which they most humbly *pray* to be allowed, as their rights and liberties, according to the laws and statutes of this realm."* One of the most material statutes of the realm was magna charta; so that we find they continue upon the old ground, as to the foundation on which they rest their liberties. It was not till the era of the revolution, that the two houses assume a higher tone, and "*demand* and insist upon all the premises as their undoubted rights and liberties."† But when the whole transaction is considered, we shall find that those rights and liberties, are claimed only on the foundation of an original contract, supposed to have been made at some former period, between the king and the people.‡

But, in this constitution, the citizens of the United States appear dispensing a part of their original power, in what manner and what proportion they think fit. They never part with the whole; and they retain the right of recalling what they part with. When, therefore, they possess, as I have already mentioned, the fee-simple of authority, why should they have recourse

* 8th Parl. Hist. 150.

† 3 Parl. Deb. 261.

‡ 1 Blackstone, 273.

to the minute and subordinate remedies, which can be necessary only to those, who pass the fee, and reserve only a rent-charge?

To every suggestion concerning a bill of rights, the citizens of the United States may always say WE reserve the right to do what we please.

MR. WILSON.—I concur most sincerely, with the honorable gentleman who was last up, in one sentiment, that if our liberties will be insecure under this system of government, it will become our duty not to adopt but reject it. On the contrary, if it will secure the liberties of the citizens of America, if it will not only secure their liberties, but procure them happiness, it becomes our duty, on the other hand, to assent to and ratify it. With a view to conduct us safely and gradually, to the determination of that important question, I shall beg leave, to notice some of the objections, that have fallen from the honourable gentleman from Cumberland (Whitehill.) But, before I proceed, permit me to make one general remark. Liberty has a formidable enemy on each hand; on one, there is tyranny, on the other licentiousness: in order to guard against the latter, proper powers ought to be given to government: in order to guard against the former, those powers ought to be properly distributed. It has been mentioned, and attempts have been made to establish the position, that the adoption of this constitution will necessarily be followed by the annihilation of all the state-governments. If this was a necessary consequence, the objection would operate in my mind with exceeding great force. But, Sir, I think the inference is rather unnatural, that a government will produce the annihilation of others, upon the very existence of which its own existence depends. Let us, Sir, examine this constitution, and mark its proportions and arrangements. It is composed of three great constituent parts, the legislative department, the executive department, and the judicial department. The legislative department is subdivided into two branches, the House of Representatives and the Senate. Can there be a House of Representatives, in the general government, after the state-governments are annihilated?—Care is taken to express the character of the electors in such a manner, that even the popular branch of the general government cannot exist, unless the governments of the states continue in existence.

How do I prove this? By the regulation that is made, concerning the important subject of giving suffrage. Article the first, section second, "and the electors in each state, shall have the qualifications for electors of the most numerous branch of the state-legislature." Now, Sir, in order to know who are qualified to be electors of the House of Representatives, we are to inquire, who are qualified to be electors of the legislature of each state; if there be no legislatures in the states, there can be no electors of them: if there be no such electors, there is a criterion to know who are qualified to elect members of the House of Representatives. By this short plain deduction, the existence of state-legislatures, is proved to be essential to the existence of the general government.

Let us proceed now to the second branch of the legislative department. In the system before you, the senators, Sir, those tyrants that are to devour the legislatures of the states, are to be chosen by the state-legislatures themselves. Need any thing more be said on this subject? So far is the principle of each state's retaining the power of self-preservation, from being weakened or endangered by the general government, that the convention went further, perhaps, than was strictly proper, in order to secure it; for in this second branch of the legislature, each state, without regard to its importance, is entitled to an equal vote. And in the articles, respecting amendments of this constitution, it is provided "that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

Does it appear then, that provision for the continuance of the state-governments was neglected, in framing this constitution? On the contrary, it was a favourite object in the convention to secure them.

The President of the United States, is to be chosen by electors appointed in the different states, in such manner as the legislature shall direct. Unless there be legislatures to appoint electors, the president cannot be chosen; the idea, therefore, of the existing government of the states, is presupposed in the very mode of constituting the legislative and the executive departments of the general government.—The same principle will apply to the judicial department. The judges are to be nominated by the President, and appointed by him, with the advice and con-

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sent of the Senate. This shows, that the judges cannot exist without the President and Senate. I have already shown that the President and Senate cannot exist without the existence of the state-legislatures. Have I misstated any thing? Is not the evidence indisputable, that the state-governments will be preserved, or that the general government must tumble amidst their ruins? It is true, indeed, Sir, although it presupposes the existence of state-governments, yet this constitution does not suppose them to be the sole power to be respected.

In the articles of confederation the people are unknown, but in this plan they are represented: and in one of the branches of the legislature they are represented, immediately, by persons of their own choice.

I hope these observations, on the nature and formation of this system, are seen in their full force; many of them were so seen by some gentlemen of the late convention. After all this, could it have been expected, that assertions, such as have been hazarded on this floor, would have been made "that it was the business of their deliberations, to destroy the state governments, that they employed four months to accomplish this object, and that such was their intention?" That honourable gentleman may be better qualified to judge of their intentions than themselves. I know my own, and, as to those of the other members I believe, that they have been very improperly and unwarrantably represented; intended to destroy! where did *he* obtain his information? Let the tree be judged of by its fruit.

Mr. president, the only proof that is attempted to be drawn from the work itself, is that which has been urged from the fourth section of the first article. I will read it—"The times, places and manner of holding elections, for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators."

And is this a proof, that it was intended to carry on this government, after the state-government should be dissolved and abrogated? This clause is not only a proper, but a necessary one. I have already shown what pains have been taken in the convention to secure the preservation of the state-governments. I hope, Sir, that it was no crime, to sow the seed of self-preservation in

in the federal government; without this clause it would not possess self preserving power. By this clause the times, places and manner of holding elections, shall be prescribed in each state, by the legislature thereof. I think it highly proper that the federal government should throw the exercise of this power into the hands of the state legislatures; but not that it should be placed there entirely without control.

If the Congress had it not in their power to make regulations, what might be the consequences? some states might make no regulations at all on the subject. And shall the existence of the House of Representatives, the immediate representation of the people in Congress, depend upon the will and pleasure of the state-governments? another thing may possibly happen, I don't say it will; but we were obliged to guard even against possibilities, as well as probabilities. A legislature may be willing to make the necessary regulations, yet the minority of that legislature may, by absenting themselves, break up the house, and prevent the execution of the intention of the majority. I have supposed the case, that some state-governments may make no regulations at all; it is possible also that they may make improper regulations. I have heard it surmised by the opponents of this constitution, that the Congress may order the election for Pennsylvania to be held at Pittsburg, and thence conclude, that it would be improper for them to have the exercise of the power; but suppose on the other hand, that the assembly should order an election to be held at Pittsburg, ought not the general government to have the power to alter such improper election of one of its own constituent parts? But there is an additional reason still, that shows the necessity of this provisional clause. The members of the Senate are elected by the state legislatures. If those legislatures possessed, uncontrolled, the power of prescribing the times, places and manner of electing members of the House of Representatives, the members of one branch of the general legislature would be the tenants at will of the electors of the other branch; and the general government would lie prostrate at the mercy of the legislatures of the several states.

I will ask now, is the inference fairly drawn, that the general government was intended to swallow up the state governments? or was it calculated to answer such end? or do its framers de-

serve such censure from honourable gentlemen? We find on examining this paragraph, that it contains nothing more, than the maxims of self-preservation, so abundantly secured by this constitution to the individual states. Several other objections have been mentioned; I will not, at this time, enter into a discussion of them, though I may hereafter take notice of such as have any show of weight. But I thought it necessary to offer at this time, the observations I have made; because I consider this as an important subject; and think the objection would be a strong one, if it was well founded.

Friday, November 30, 1787, A. M.

MR. WILSON.—It is objected that the number of members in the House of Representatives is too small. This is a subject something embarrassing, and the convention who framed the article, felt the embarrassment. Take either side of the question, and you are necessarily led into difficulties. A large representation, Sir, draws along with it a great expense. We all know that expense is offered as an objection to this system of government, and certainly had the representation been greater, the clamour would have been on that side, and, perhaps with some degree of justice. But the expense is not the sole objection; it is the opinion of some writers, that a deliberative body ought not to consist of more than one hundred members. I think, however, that there might be safety and propriety in going beyond that number; but certainly there is some number so large, that it would be improper to increase them beyond it. The British House of Commons consists of upwards of five hundred. The senate of Rome consisted, it is said, at some times, of one thousand members. This last number is certainly too great.

The convention endeavoured to steer a middle course, and when we consider the scale on which they formed their calculation, there are strong reasons, why the representation should not have been larger. On the ratio that they have fixed, of one for every thirty-thousand, and according to the generally received opinion of the increase of population throughout the United States, the present number of their inhabitants will be doubled in twenty five years, and according to that progressive proportion, and the ratio of one member for thirty thousand in-

habitants, the House of Representatives will, within a single century, consist of more than six hundred members; permit me to add a further observation on the numbers—that a large number is not so necessary in this case, as in the cases of state-legislatures. In them there ought to be a representation sufficient to declare the situation of every county, town and district; and if of every individual, so much the better, because their legislative powers extend to the particular interest and convenience of each, but in the general government, its objects are enumerated, and are not confined in their causes or operations, to a county, or even to a single state.—No one power is of such a nature, as to require the minute knowledge of situations and circumstances necessary in state-governments, possessed of general legislative authority; these were the reasons, Sir, that I believe had influence on the convention to agree to the number of thirty thousand, and when the inconveniencies and conveniencies on both sides are compared, it would be difficult to say what would be a number more unexceptionable.

Saturday, December 1, 1787, A. M.

MR. WILSON.—The secret is now disclosed, and it is discovered to be a dread, that the boasted state-sovereignties, will under this system be disrobed of part of their power. Before I go into the examination of this point, let me ask one important question—Upon what principle is it contended that the sovereign power resides in the state-governments? the honourable gentleman has said truly, that there can be no subordinate sovereignty. Now if there can not, my position is, that the sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of power as were conceived necessary for the publick welfare. This constitution stands upon this broad principle. I know very well, Sir, that the people have hitherto been shut out of the federal government, but it is not meant that they should any longer be dispossessed of their rights. In order to recognize this leading principle, the proposed system sets out with a declaration, that its existence depends upon the supreme authority of the people alone. We have heard much about a consolidated government. I wish the honourable gentleman would condescend to give us a definition of what he meant by it. I think

this the more necessary, because I apprehend that the term, in the numerous times it has been used, has not always been used in the same sense. It may be said and I believe it has been said, that a consolidated government is such, as will absorb and destroy the governments of the several states. If it is taken in this view, the plan before us is not a consolidated government, as I showed on a former day, and may, if necessary, show further on some future occasion.—On the other hand, if it is meant, that the general government will take from the state-governments their power, in some particulars, it is confessed and evident, that this will be its operation and effect.

When the principle is once settled, that the people are the source of authority, the consequence is, that they may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that there they will be productive of more good.—They can distribute one portion of power, to the more contracted circle, called state-governments: they can also furnish another proportion to the government of the United States. Who will undertake to say, as a state-officer, that the people may not give to the general government what powers, and for what purposes they please? how comes it, Sir, that these state-governments dictate to their superiors? to the majesty of the people? When I say the majesty of the people, I mean the thing and not a mere compliment to them. The honourable gentleman went a step further and said, that the state-governments were kept out of this government altogether. The truth is, and it is a leading principle in this system, that not the states only, but the people also shall be here represented. And if this is a crime, I confess the general government is chargeable with it; but I have no idea, that a safe system of power, in the government, sufficient to manage the general interest of the United States, could be drawn from any other source, or rested in any other authority than that of the people at large, and I consider this authority as the rock on which this structure will stand.—If this principle is unfounded, the system must fall. If honourable gentlemen, before they undertake to oppose this principle, will show that the people have parted with their power to the state-governments, then I confess I cannot support this constitution. It

is asked can there be two taxing powers? Will the people submit to two taxing powers? I think they will, when the taxes are required for the publick welfare, by persons appointed immediately by their fellow citizens.

But I believe this doctrine is a very disagreeable one to some of the state governments. All the objects that will furnish an increase of revenue, are eagerly seized by them; perhaps this will lead to the reason why a state-government, when she was obliged to pay only about an eighth part of the loan-office certificates, should voluntarily undertake the payment of about one third part of them. This power of taxation will be regulated in the general government upon equitable principles. No state can have more than her just proportion to discharge—no longer will government be obliged to assign her funds for the payment of debts she does not owe. Another objection has been taken, that the judicial powers are co-extensive with the objects of the national government. So far as I can understand the idea of magistracy in every government, this seems to be a proper arrangement; the judicial department is considered as a part of the executive authority of government. Now, I have no idea that the authority should be restrained, so as not to be able to perform its functions with full effect. I would not have the legislature sit to make laws, which cannot be executed. It is not meant here that the laws shall be a dead letter; it is meant, that they shall be carefully and duly considered, before they are enacted; and that then they shall be honestly and faithfully executed. This observation naturally leads to a more particular consideration of the government before us. In order, Sir, to give permanency, stability and security to any government, I conceive it of essential importance, that its legislature should be restrained; that there should not only be, what we call a *passive*, but an *active* power over it; for of all kinds of despotism, this is the most dreadful, and the most difficult to be corrected. With how much contempt have we seen the authority of the people, treated by the legislature of this state—and how often have we seen it making laws in one session, that have been repealed the next, either on account of the fluctuation of party, or their own impropriety.

This could not have been the case in a compound legislature; it is therefore proper to have efficient restraints upon the legisla-

tive body. These restraints arise from different sources: I will mention some of them. In this constitution they will be produced in a very considerable degree, by a division of the power in the legislative body itself. Under this system, they may arise likewise from the interference of those officers, who will be introduced into the executive and judicial departments. They may spring also from another source; the election by the people; and finally, under this constitution, they may proceed from the great and last resort—from *the people* themselves. I say, under this constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, Sir, to explain clearly and satisfactorily. I had occasion, on a former day, to state that the power of the constitution was paramount to the power of the legislature, acting under that constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles, and find it to be incompatible with the superior power of the constitution, it is their duty to pronounce it void; and judges independent, and not obliged to look to every session, for a continuance of their salaries, will behave with intrepidity, and refuse to the act the sanction of judicial authority. In the same manner, the President of the United States could shield himself, and refuse to carry into effect, an act that violates the constitution.

In order to secure the President from any dependence upon the legislature, as to his salary, it is provided, that he shall, at stated times, receive for his services, a compensation that shall neither be increased nor diminished, during the period for which he shall have been elected, and that he shall not receive, within that period, any other emolument from the United States, or any of them.

To secure to the judges this independence, it is ordered that they shall receive for their services, a compensation which shall not be diminished during their continuance in office. The Congress may be restrained, by the election of its constituent parts. If a legislature shall make a law contrary to the constitution, or oppressive to the people, they have it in their power, every se-

cond year, in one branch, and every sixth year in the other, to displace the men, who act thus inconsistent with their duty ; and if this is not sufficient, they have still a further power ; they may assume into their own hands, the alteration of the constitution itself—they may revoke the lease, when the conditions are broken by the tenant. But the most useful restraint upon the legislature, because it operates constantly, arises from the division of its power, among two branches, and from the qualified negative of the president upon both. As this government is formed, there are two sources from which the representation is drawn, though they both ultimately flow from the people. *States* now exist and others will come into existence ; it was thought proper that they should be represented in the general government. But, gentlemen will please to remember, this constitution was not framed merely for the states ; it was framed for the *people* also ; and the popular branch of the Congress, will be the objects of their immediate choice.

The two branches will serve as checks upon each other ; they have the same legislative authorities, except in one instance. Money-bills must originate in the House of Representatives. The Senate can pass no law without the concurrence of the House of Representatives ; nor can the House of Representatives without the concurrence of the Senate. I believe, Sir, that the observation which I am now going to make, will apply to mankind in every situation ; they will act with more caution, and perhaps more integrity, if their proceedings are to be under the inspection and control of another, than when they are not. From this principle, the proceedings of Congress will be conducted with a degree of circumspection not common in single bodies, where nothing more is necessary to be done than to carry the business through amongst themselves, whether it be right or wrong. In compound legislatures, every object must be submitted to a distinct body, not influenced by the arguments, or warped by the prejudices of the other. And I believe, that the persons who will form the Congress, will be cautious of running the risk, *with a bare majority*, of having the negative of the President put on their proceedings. As there will be more circumspection in forming the laws, so there will be more stability in the laws when made. Indeed one is the consequence of the other ; for what has

been well considered and founded in good sense, will, in practice, be useful and salutary, and of consequence will not be liable to be soon repealed. Though two bodies may not possess more wisdom or patriotism than what may be found in a single body, yet they will necessarily introduce a greater degree of precision. An indigested and inaccurate code of laws is one of the most dangerous things that can be introduced into any government. The force of this objection is well known by every gentleman that has attended to the laws of this state. This, Sir, is a very important advantage that will arise from this division of the legislative authority.

I will now proceed to take some notice of a still further restraint upon the legislature. I mean the qualified negative of the President. I think this will be attended with very important advantages, for the security and happiness of the people of the United States. The President, Sir, will not be a stranger to our country, to our laws, or to our wishes. He will, under this constitution, be placed in office as the President of the whole union, and will be chosen in such a manner that he may be justly styled *the man of the PEOPLE*; being elected by the different parts of the United States, he will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection. This will be the natural conduct to recommend him to those who placed him in that high chair, and I consider it as a very important advantage, that such a man must have every law presented to him before it can become binding upon the United States. He will have before him the fullest information of our situation, he will avail himself not only of records and official communications, foreign and domestic, but he will have also the advice of the executive officers in the different departments of the general government.

If, in consequence of this authority and advice, he exercise the authority given to him, the effect will not be lost—he returns his objections, together with the bill, and unless two thirds of both branches of the legislature are *now* found to approve it, it does not become a law. But even if his objections do not prevent its passing into a law, they will not be useless; they will be kept together with the law, and in the archives of Congress will be valuable and practical materials, to form the minds of posterity

for legislation—if it is found that the law operates inconveniently or oppressively, the people may discover in the President's objections the source of that inconvenience or oppression. Further, Sir, when objections shall have been made, it is provided, in order to secure the greatest degree of caution and responsibility, that the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered in the journal of each house respectively. Thus much have I thought proper to say, with regard to the distribution of the legislative authority, and the restraints under which it will be exercised.

The gentleman in opposition strongly insists that the general clause at the end of the eighth section gives to Congress a power of legislating generally; but I cannot conceive by what means he will render the word susceptible of that expansion. Can the words the Congress shall have power to make all laws, which shall be necessary and proper to carry into execution the foregoing powers, be capable of giving them general legislative power? I hope that it is not intended to give to Congress merely an illusive show of authority, to deceive themselves or their constituents any longer. On the contrary, I trust it is meant that they shall have the power of carrying into effect the laws which they shall make under the powers vested in them by this constitution. In answer to the gentleman from Fayette (Mr. Smilie) on the subject of the press, I beg leave to make an observation. It is very true, Sir, that this constitution says nothing with regard that subject, nor was it necessary, because it will be found that there is given to the general government no power whatsoever concerning it; and no law in pursuance of the constitution can possibly be enacted to destroy that liberty.

I heard the honourable gentleman make this general assertion, that the Congress was certainly vested with power to make such a law, but I would be glad to know by what part of this constitution such a power is given. Until that is done, I shall not enter into a minute investigation of the matter, but shall at present satisfy myself with giving an answer to a question that has been put. It has been asked, if a law should be made to punish libels, and the judges should proceed under that law, what

chance would the printer have of an acquittal? And it has been said he would drop into a den of devouring monsters.

I presume it was not in the view of the honourable gentleman to say there is no such thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country—what is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every authour is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual.

With regard to attacks upon the publick, the mode of proceeding is by a prosecution. Now, if a libel is written, it must be within some one of the United States or the district of Congress. With regard to that district, I hope it will take care to preserve this as well as the other rights of freemen; for whatever district Congress may choose, the cession of it cannot be completed without the consent of its inhabitants. Now, Sir, if this libel is to be tried, it must be tried where the offence was committed; for under this constitution, as declared in the second section of the third article, the trial must be held in the state; therefore on this occasion it must be tried where it was published, if the indictment is for publishing; and it must be tried likewise by a jury of that state. Now, I would ask, is the person prosecuted in a worse situation under the general government, even if it had the power to make laws on this subject than he is at present under the state-government? It is true, there is no particular regulation made to have the jury come from the body of the county in which the offence was committed; but there are some states in which this mode of collecting juries is contrary to their established custom, and gentlemen ought to consider that this constitution was not meant merely for Pennsylvania. In some states the juries are not taken from a single county. In Virginia, the sheriff, I believe, is not confined, even to the inhabitants of the state, but is at liberty to take any man he pleases, and put him upon the jury. In Maryland, I think, a set of jurors serve for the whole Western Shore, and another for the Eastern Shore.

I beg leave to make one remark on what one gentleman has said, with respect to amendments being proposed by this constitution. To whom are the convention to make report of such

amendments? He tells you, to the present Congress. I do not wish to report to that body, the representatives only of the state-governments; they may not be disposed to admit the people into a participation of their power. It has also been supposed, that a wonderful unanimity subsists among those who are enemies to the proposed system. On this point I also differ from the gentleman who made the observation. I have taken every pains in my power, and read every publication I could meet with, in order to gain information; and, as far as I have been able to judge, the opposition is inconsiderable and inconsistent. Instead of agreeing in their objections, those who make them bring forward such as are diametrically opposite. On one hand, it is said that the representation in Congress is too small; on the other, it is said to be too numerous. Some think the authority of the Senate too great; some that of the House of Representatives, and some that of both. Others draw their fears from the powers of the President; and like the iron race of Cadmus, these opponents rise only to destroy each other.

Monday, December 3, 1787, A. M.

MR. WILSON.—Take detached parts of any system whatsoever, in the manner these gentlemen have hitherto taken this constitution, and you will make it absurd and inconsistent with itself. I do not confine this observation to human performances alone; it will apply to divine writings. An anecdote which I have heard exemplifies this observation: When Sternhold and Hopkins' version of the psalms was usually sung in churches, a line was first read by the clerk and then sung by the congregation. A sailor had stepped in, and heard the clerk read this line:

"The Lord will come, and he will not—

The sailor stared; and when the clerk read the next line,

"Keep silence, but speak out."

the sailor left the church, thinking the people were not in their senses.

This story may convey an idea of the treatment of the plan before you; for although it contains sound sense, when connected,

yet by the detached manner of considering it, it appears highly absurd.

MR. WILSON.—Much fault has been found with the mode of expression, used in the first clause of the ninth section of the first article. I believe I can assign a reason why that mode of expression was used, and why the term slave was not directly admitted in this constitution; and as to the manner of laying taxes, this is not the first time that the subject has come into the view of the United States, and of the legislatures of the several states. The gentleman (Mr. Findley) will recollect, that in the present Congress, the quota of the federal debt and general expenses was to be in proportion to the value of land and other enumerated property, within the states. After trying this for a number of years, it was found to be a mode that could not be carried into execution. Congress were satisfied of this, and in the year 1783 recommended, in conformity with the powers they possessed under the articles of confederation, that the quota should be according to the number of free people, including those bound to servitude, and excluding Indians not taxed, and the fate of this resolution was similar to all their other resolutions. It was not carried into effect, but it was adopted by no fewer than eleven out of thirteen states; and it cannot but be matter of surprise to hear gentlemen who agreed to this very mode of expression at that time, come forward and state it as an objection on the present occasion. It was natural, Sir, for the late convention, to adopt the mode, after it had been agreed to by eleven states, and to use the expression which they found had been received as unexceptionable before. With respect to the clause restricting Congress from prohibiting the migration or importation of such persons as any of the states now existing shall think proper to admit, prior to the year 1808. The honourable gentleman says, that this clause is not only dark, but intended to grant to Congress, for that time, the power to admit the importation of slaves. No such thing was intended; but I will tell you what was done, and it gives me high pleasure, that so much was done. Under the present confederation, the states may admit the importation of slaves as long as they please; but by this article after the year 1808, the Congress will have power to prohibit such importation,

notwithstanding the disposition of any state to the contrary. I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change, which was pursued in Pennsylvania. It is with much satisfaction I view this power in the general government, whereby they may lay an interdiction on this reproachful trade; but an immediate advantage is also obtained, for a tax or duty may be imposed on such importation, not exceeding ten dollars for each person; and this, Sir, operates as a partial prohibition; it was all that could be obtained; I am sorry it was no more; but from this I think there is reason to hope, that yet a few years, and it will be prohibited altogether; and in the mean time, the new states which are to be formed, will be under the control of Congress in this particular; and slaves will never be introduced amongst them. The gentleman says, that it is unfortunate in another point of view; it means to prohibit the introduction of white people from Europe, as this tax may deter them from coming amongst us; a little impartiality and attention will discover the care that the convention took in selecting their language. The words are, the *migration or importation* of such persons, &c. shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such *importation*; it is observable here, that the term migration is dropped, when a tax or duty is mentioned; so that Congress have power to impose the tax, only on those imported.

Tuesday December, 4, 1787, A. M.

MR. WILSON.—I shall take this opportunity, of giving an answer to the objections already urged against the constitution; I shall then point out some of those qualities, that entitle it to the attention and approbation of this convention; and after having done this, I shall take a fit opportunity of stating the consequences, which I apprehend will result from rejecting it, and those which will probably result from its adoption. I have given the utmost attention to the debates and the objections, that from time to time have been made by the three gentlemen who speak in opposition. I have reduced them to some order, perhaps not better than that in which they were introduced. I will state them; they will be in the recollection of the house, and I will endeavour

to give an answer to them—in that answer, I will interweave some remarks, that may tend to elucidate the subject.

A good deal has already been said, concerning a bill of rights; I have stated, according to the best of my recollection, all that passed in convention, relating to that business. Since that time I have spoken with a gentleman, who has not only his memory, but full notes, that he had taken in that body; and he assures me, that upon this subject, no direct motion was ever made at all; and certainly, before we heard this so violently supported out of doors, some pains ought to have been taken to have tried its fate within; but the truth is, a bill of rights would, as I have mentioned already, have been not only unnecessary but improper. In some governments it may come within the gentleman's idea, when he says it can do no harm; but even in these governments, you find bills of rights do not uniformly obtain; and do those states complain who have them not? Is it a maxim in forming governments, that not only all the powers which are given, but also that all those which are reserved, should be enumerated? I apprehend, that the powers given and reserved, form the whole rights of the people, as men and as citizens. I consider, that there are very few, who understand the *whole* of these rights. All the political writers, from Grotius and Puffendorf, down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights, appertaining to the people as men and as citizens.

There are two kinds of government; that where general power is intended to be given to the legislature, and that, where the powers are particularly enumerated. In the last case, the implied result is, that nothing more is intended to be given, than what is so enumerated, unless it results from the nature of the government itself. On the other hand, when general legislative powers are given, then the people part with their authority, and on the gentleman's principle of government, retain nothing. But in a government like the proposed one, there can be no necessity for a bill of rights. For, on my principle, the people never part with their power. Enumerate all the rights of men!—I am sure, Sir, that no gentleman in the late convention would have attempted such a thing. I believe the honourable speakers in opposition

on this floor, were members of the assembly which appointed delegates to that convention; if it had been thought proper to have sent them into that body, how luminous would the *dark conclave* have been! So the gentleman has been pleased to denominate that body. Aristocrats as they were, they pretended not to define the rights of those who sent them there. We are asked repeatedly, what *harm* could the addition of a bill of rights do? If it can do no *good*, I think that a sufficient reason, to refuse having any thing to do with it. But to whom are we to report this bill of rights, if we should adopt it? Have we authority from those who sent us here to make one?

It is true we may propose, as well as any other private persons; but how shall we know the sentiments of the citizens of this state and of the other states? Are we certain that any one of them will agree with our definitions and enumerations?

In the second place, we are told, that there is no check upon the government but the people; it is fortunate, Sir, if their superintending authority is allowed as a check: But I apprehend that in the very construction of this government, there are numerous checks. Besides those expressly enumerated, the two branches of the legislature are mutual checks upon each other. But this subject will be more properly discussed, when we come to consider the form of government itself; and then I mean to show the reason, why the right of habeas corpus was secured by a particular declaration in its favour.

In the third place we are told, that there is no security for the rights of conscience. I ask the honourable gentleman, what part of this system puts it in the power of Congress to attack those rights? When there is no power to attack, it is idle to prepare the means of defence.

After having mentioned, in a cursory manner, the foregoing objections, we now arrive at the leading ones against the proposed system.

The very manner of introducing this constitution, by the recognition of the authority of the people, is said to change the principle of the present confederation, and to introduce a *consolidating* and absorbing government!

In this confederated republick, the sovereignty of the states, it is said, is not preserved. We are told, that there cannot be two

sovereign powers, and that a subordinate sovereignty is no sovereignty.

It will be worth while, Mr. president, to consider this objection at large. When I had the honour of speaking formerly on this subject, I stated, in as concise a manner as possible, the leading ideas that occurred to me, to ascertain where the supreme and sovereign power resides. It has not been, nor, I presume, will it be denied, that somewhere there is, and of necessity must be, a supreme, absolute and uncontrollable authority. This, I believe, may justly be termed the sovereign power; for from that gentleman's (Mr. Findley) account of the matter, it cannot be sovereign, unless it is supreme; for, says he, a subordinate sovereignty is no sovereignty at all. I had the honour of observing, that if the question was asked, where the supreme power resided, different answers would be given by different writers. I mentioned, that Blackstone will tell you, that in Britain, it is lodged in the British Parliament; and I believe there is no writer on this subject on the other side of the Atlantick, but supposes it to be vested in that body. I stated further, that if the question was asked some politician, who had not considered the subject with sufficient accuracy, where the supreme power resided in our governments, he would answer, that it was vested in the state-constitutions. This opinion approaches near the truth, but does not reach it; for the truth is, that the supreme, absolute and uncontrollable authority, *remains* with the people. I mentioned also, that the practical recognition of this truth was reserved for the honour of this country. I recollect no constitution founded on this principle: but we have witnessed the improvement, and enjoy the happiness, of seeing it carried into practice. The great and penetrating mind of Locke, seems to be the only one that pointed towards even the theory of this great truth.

When I made the observation, that some politicians would say the supreme power was lodged in our state-constitutions, I did not suspect that the honourable gentleman from Westmoreland (Mr. Findley) was included in that description; but I find myself disappointed; for I imagined his opposition would arise from another consideration. His position is, that the supreme power resides in the states, as governments; and mine is, that it *resides* in the *people*, as the fountain of government; that the

people have not—that the people mean not—and that the people ought not, to part with it to any government whatsoever. In their hands it remains secure. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper. I agree with the members in opposition, that there cannot be two sovereign powers on the same subject.

I consider the people of the United States, as forming one great community ; and I consider the people of the different states, as forming communities again on a lesser scale. From this great division of the people into distinct communities, it will be found necessary, that different proportions of legislative powers should be given to the governments, according to the nature, number, and magnitude of their objects.

Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the states as made *for* the people, as well as *by* them, and not the people as made for the states ; the people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please ; or to accommodate them to one another ; and by this means preserve them all ; this, I say, is the inherent and inalienable right of the people ; and as an illustration of it, I beg to read a few words from the declaration of independence, made by the representatives of the United States, and recognized by the whole union.

“ We hold these truths to be self-evident, that all men are created equal ; that they are endowed by their Creator with certain inalienable rights ; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, *governments* are instituted among men, *deriving their just powers from the consent of the governed* ; that whenever any form of government becomes destructive of these ends, it is the RIGHT of the people, to alter or to abolish it, and institute new governments, laying its foundation on such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness.”

This is the broad basis on which our independence was placed : on the same certain and solid foundation this system is erected.

State-sovereignty, as it is called, is far from being able to support its weight. Nothing less than the authority of the people, could either support it, or give it efficacy. I cannot pass over this subject, without noticing the different conduct pursued by the late federal convention, and that observed by the convention which framed the constitution of Pennsylvania; on that occasion you find an attempt made to deprive the people of this right, so lately and so expressly asserted in the declaration of independence. We are told in the preamble to the declaration of rights, and frame of government, that *we* do, by virtue of authority vested in *us*, ordain, declare and establish, the following declaration of rights, and frame of government, to be the constitution of this commonwealth, and to remain in force therein UNALTERED, except in such articles as shall hereafter, on experience, be found to require improvement, and which shall be, by the same authority, of the people, fairly delegated, *as this frame of government directs*. An honourable gentleman, (Mr. Chambers) was well warranted in saying, that all that could be done, was done, to cut off the people from the right of amending; for if it cannot be amended by any other mode than that which it directs, then any number more than one third, may controul any number less than two thirds.

But I return to my general reasoning.—My position is, Sir, that in this country the supreme, absolute and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state-governments; but that the fee simple continues, resides and remains, with the body of the people. Under the practical influence of this great truth, we are now sitting and deliberating, and under its operation, we can sit as calmly, and deliberate as coolly, in order to change a constitution, as a legislature can sit and deliberate under the power of a constitution, in order to alter or amend a law. It is true the exercise of this power will not probably be so frequent, nor resorted to on so many occasions in one case, as in the other: but the recognition of the principle cannot fail to establish it more firmly; but because this recognition is made in the proposed constitution, an exception is taken to the whole of it: for we are told, it is a violation of the present confederation—a confederation of sovereign states. I shall not enter into an investigation of the

present confederation, but shall just remark, that its principle is not the principle of free governments. The *people* of the United States are not as such represented in the present Congress; and considered even as the component parts of the several states they are not represented in proportion to their numbers and importance.

In this place I cannot help remarking, on the general inconsistency which appears between one part of the gentleman's objections and another. Upon the principle we have now mentioned, the honourable gentleman contended, that the powers ought to flow from the states; and that all the late convention had to do, was to give additional powers to Congress. What is the present form of Congress? A single body, with some legislative, but little executive, and no effective judicial power. What are these additional powers that are to be given? In some cases legislative are wanting, in others judicial, and in others executive; these, it is said, ought to be allotted to the general government; but the impropriety of delegating such extensive trust to one body of men is evident; yet in the same day, and perhaps in the same hour, we are told, by honourable gentlemen, that these three branches of government are not kept sufficiently distinct in this constitution; we are told also that the senate, possessing some executive power, as well as legislative, is such a monster that it will swallow up and absorb every other body in the general government, after having destroyed those of the particular states.

Is this reasoning with consistency? Is the Senate under the proposed constitution so tremendous a body, when checked in their legislative capacity by the House of Representatives, and in their executive authority, by the President of the United States? Can this body be so tremendous as the present Congress, a single body of men possessed of legislative, executive and judicial powers? To what purpose was Montesquieu read to show that this was a complete tyranny? The application would have been more properly made by the advocates of the proposed constitution, against the patrons of the present confederation.

It is mentioned that this federal government will annihilate and absorb all the state-governments. I wish to save as much as possible the time of the house, I shall not, therefore, recapitulate what I had the honour of saying last week on this subject; I hope

it was then shown, that instead of being abolished (as insinuated) from the very nature of things, and from the organization of the system itself, the state-governments must exist, or the general government must fall amidst their ruins ; indeed so far as to the forma, it is admitted they may remain ; but the gentlemen seem to think their power will be gone.

I shall have occasion to take notice of this power hereafter, and, I believe, if it was necessary, it could be shown that the state-governments, as states, will enjoy as much power, and more dignity, happiness and security, than they have hitherto done. I admit, Sir, that some of the powers will be taken from them, by the system before you ; but it is, I believe, allowed on all hands, at least it is not among us a disputed point, that the late convention was appointed with a particular view to give more power to the government of the union : it is also acknowledged, that the intention was to obtain the advantage of an efficient government over the United States ; now, if power is to be given to that government, I apprehend it must be taken from some place. If the state governments are to retain all the powers they held before, then, of consequence, every new power that is given to Congress must be taken from the people at large. Is this the gentleman's intention ? I believe a strict examination of this subject will justify me in asserting, that the states, as governments, have assumed too much power to themselves, while they left little to the people. Let not this be called cajoling the people—the elegant expression used by the honourable gentleman from Westmoreland (Mr. Findley)—it is hard to avoid censure on one side or the other. At some time it has been said, that I have not been at the pains to conceal my contempt of the people ; but when it suits a purpose better, it is asserted that I cajole them. I do neither one nor the other. The voice of approbation, Sir, when I think that approbation well earned, I confess is grateful to my ears ; but I would disdain it, if it is to be purchased by a sacrifice of my duty, or the dictates of my conscience. No, Sir, I go practically into this system, I have gone into it practically when the doors were shut ; when it could not be alleged that I cajoled the people, and I now endeavour to show that the true and only safe principle for a free people, is practical recognition of their original and supreme authority.

I say, Sir, that it was the design of this system, to take some power from the state-government, and to place it in the general government. It was also the design, that the people should be admitted to the exercise of some powers, which they did not exercise under the present confederation. It was thought proper, that the citizens, as well as the states should be represented; how far the representation in the Senate is a representation of states, we shall see by and by, when we come to consider that branch of the federal government.

This system, it is said, "unhinges and eradicates the state-governments, and was systematically intended so to do;" to establish the *intention*, an argument is drawn from art. 1st. sect. 4th on the subject of elections. I have already had occasion to remark upon this, and shall therefore pass on to the next objection.

That the last clause of the 8th section of the 1st article, gives the power of self-preservation to the general government, *independent* of the states. For in case of their *abolition*, it will be alleged in behalf of the general government, that self-preservation is the first law, and necessary to the exercise of *all other* powers.

Now let us see what this objection amounts to. Who are to have this self-preserving power? The Congress. Who are Congress? It is a body that will consist of a Senate and a House of Representatives. Who compose this Senate? Those who are *elected* by the *legislature* of the different states. Who are the electors of the House of Representatives? Those who are *qualified to vote* for the most numerous branch of the *legislature* in the separate states. Suppose the state-legislatures annihilated, where is the criterion to ascertain the qualification of electors? And unless this be ascertained, they cannot be admitted to vote; if a state-legislature is not elected, there can be no Senate, because the senators are to be chosen by the *legislatures* only.

This is a plain and simple deduction from the constitution, and yet the objection is stated as conclusive upon an argument expressly drawn from the last clause of this section.

It is repeated, with confidence, "that this is not a *federal* government, but a complete one, with legislative, executive and judicial powers: It is a *consolidating* government." I have already mentioned the misuse of the term; I wish the gentleman would

indulge us with his definition of the word. If, when he says it is a consolidation, he means so far as relates to the general objects of the union—so far it is was intended to be a consolidation, and on such a consolidation, perhaps our very existence, as a nation, depends. If, on the other hand (as something which has been said seems to indicate) he (Mr. Findley) means that it will absorb the governments of the individual states, so far is this position from being admitted, that it is unanswerably controverted. The existence of the state government, is one of the most prominent features of this system. With regard to those purposes which are allowed to be for the general welfare of the union, I think it no objection to this plan, that we are told it is a complete government. I think it no objection, that it is alleged the government will possess legislative, executive and judicial powers. Should it have only legislative authority! we have had examples enough of such a government, to deter us from continuing it. Shall Congress any longer continue to make requisitions from the several states, to be treated sometimes with silent and sometimes with declared contempt? For what purpose give the power to make laws, unless they are to be executed? And if they are to be executed, the executive and judicial powers will necessarily be engaged in the business.

Do we wish a return of those insurrections and tumults to which a sister state was lately exposed? Or a government of such insufficiency as the present is found to be? Let me, Sir, mention one circumstance in the recollection of every honourable gentleman who hears me. To the determination of Congress are submitted all disputes between states, concerning boundary, jurisdiction, or right of soil. In consequence of this power, after much altercation, expense of time, and considerable expense of money, this state was successful enough to obtain a decree in her favour, in a difference then subsisting between her and Connecticut; but what was the consequence? The Congress had no power to carry the decree into execution. Hence the distraction and animosity, which have ever since prevailed, and still continue in that part of the country. Ought the government then to remain any longer incomplete? I hope not; no person can be so insensible to the lessons of experience as to desire it.

It is brought as an objection "that there will be a rivalry between the state governments and the general government ; on each side endeavours will be made to increase power."

Let us examine a little into this subject. The gentlemen tell you, Sir, that they expect the states will not possess any power. But I think there is reason to draw a different conclusion. Under this system their respectability and power will increase with that of the general government. I believe their happiness and security will increase in a still greater proportion ; let us attend a moment to the situation of this country. It is a maxim of every government, and it ought to be a maxim with us, that the increase of numbers increases the dignity, the security, and the respectability of all governments. It is the first command given by the Deity to man, increase and multiply ; this applies with peculiar force to this country, the smaller part of whose territory is yet inhabited. We are representatives, Sir, not merely of the present age, but of future times ; not merely of the territory along the sea-coast, but of regions immensely extended westward. We should fill, as fast as possible, this extensive country, with men who shall live happy, free and secure. To accomplish this great end ought to be the leading view of all our patriots and statesmen. But how it is to be accomplished, but by establishing peace and harmony among ourselves, and dignity and respectability among foreign nations. By these means, we may draw numbers from the other side of the Atlantick, in addition to the natural sources of population. Can either of these objects be attained without a protecting head?—When we examine history, we shall find an important fact, and almost the only fact, which will apply to all confederacies.

They have all fallen to pieces, and have not absorbed the subordinate governments.

In order to keep republicks together they must have a strong binding force, which must be either external or internal. The situation of this country shows, that no foreign force can press us together, the bonds of our union ought therefore to be indissolubly strong.

The powers of the states, I apprehend, will increase with the population, and the happiness of their inhabitants. Unless we can establish a character abroad, we shall be unhappy from

foreign restraints, or internal violence. These reasons, I think, prove sufficiently the necessity of having a federal head. Under it the advantages enjoyed by the whole union would be participated by every state. I wish honourable gentlemen would think not only of themselves, not only of the present age, but of others, and of future times.

It has been said, "that the state-governments will not be able to make head against the general government," but it might be said with more propriety, that the general government will not be able to maintain the powers given it against the encroachments and combined attacks of the state-governments. They possess some particular advantages, from which the general government is restrained. By this system, there is a provision made in the constitution, that, no senator or representative, shall be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during the time for which he was elected; and no person holding any office under the United States can be a member of either house; but there is no similar security against state-influence, as a representative may enjoy places; and even sinecures under the state-governments. On which side is the door most open to corruption? If a person in the legislature is to be influenced by an office, the general government can give him none unless he vacate his seat. When the influence of office comes from the state-government, he can retain his seat and salary too. But, it is added, under this head "that state-governments will lose the attachment of the people, by losing the power of conferring advantages, and that the people will not be at the expense of keeping them up." Perhaps the state governments have already become so expensive as to alarm the gentlemen on that head. I am told that the civil list of this state amounted to 40,000*l.* in one year. Under the proposed government, I think it would be possible to obtain in Pennsylvania every advantage we now possess, with a civil list that shall not exceed one third of that sum.

How differently the same thing is talked of, if it be a favourite or otherwise! when advantage to an officer are to be derived from the general government, we hear them mentioned by the name of *bribery*, but when we are told of the state-governments

losing the power of conferring advantages, by the disposal of offices, it is said they will lose the *attachment* of the people: What is in one instance corruption and bribery, is in another the power of conferring advantages.

We are informed "that the state elections will be ill attended, and that the state-governments will become mere boards of electors." Those who have a due regard for their country, will discharge their duty, and attend; but those who are brought only from interest or persuasion had better stay away; the publick will not suffer any disadvantage from their absence. But the honest citizens, who know the value of the privilege, will undoubtedly attend, to secure the man of their choice. The power and business of the state legislatures relates to the great objects of life, liberty and property, the same are also objects of the general government.

Certainly the citizens of America will be as tenacious in the one instance as in the other. They will be interested, and I hope will exert themselves, to secure their rights not only from being injured by the state-governments, but also from being injured by the general government.

"The power over election, and of judging of elections, gives absolute sovereignty," this power is given to every state-legislature, yet I see no necessity, that the power of absolute sovereignty should accompany it. My general position is, that the absolute sovereignty never goes from the people.

We are told, "that it will be in the power of the Senate to prevent any addition of representatives to the lower house."

I believe their power will be pretty well balanced, and though the Senate should have a desire to do this, yet the attempt will answer no purpose; for the House of Representatives will not let them have a farthing of publick money, till they agree to it. And the latter influence will be as strong as the other.

"Annual assemblies are necessary" it is said—and I answer in many instances they are very proper—In Rhode Island and Connecticut they are elected for six months. In larger states, that period would be found very inconvenient, but in a government as large as that of the United States, I presume that annual elections would be more disproportionate, than elections for six months would be in some of our largest states.

"The British Parliament took to themselves the prolongation of their sitting to seven years. But even in the British Parliament the appropriations are annual."

But, Sir, how is the argument to apply here?—How are the Congress to assume such a power? They cannot assume it under the constitution, for that expressly provides "the members of the House of Representatives shall be chosen every two years, by the people of the several states, and the senators for six years." So if they take it at all, they must take it by usurpation and force.

"Appropriations may be made for two years,—though in the British Parliament they are made but for one,"—for some purposes, such appropriations made be made annually, but for every purpose they are not; even for a standing army, they may be made for seven, ten, or fourteen years—the civil list is established, during the life of a prince.—Another objection is "that the members of the Senate may enrich themselves—they may hold their office as long as they live, and there is no power to prevent them; the Senate will swallow up every thing."—I am not a blind admirer of this system. Some of the powers of the senators are not with me the favourite parts of it, but as they stand connected with other parts, there is still security against the efforts of that body: it was with great difficulty that the security was obtained, and I may risk the conjecture, that if it is not now accepted, it never will be obtained again from the same states. Though the Senate was not a favourite of mine, as to some of its powers, yet it was a favourite with a majority in the union, and we must submit to that majority, or we must break up the union. It is but fair to repeat those reasons, that weighed with the convention; perhaps, I shall not be able to do them justice, but yet I will attempt to show, why additional powers were given to the Senate, rather than to the House of Representatives. These additional powers, I believe, are, that of trying impeachments, that of concurring with the President in making treaties, and that of concurring in the appointment of officers. These are the powers that are stated as improper. It is fortunate, that in the exercise of every one of them, the Senate stands controlled; if it is that monster which it is said to be, it can only show its teeth; it is unable to bite or devour: with regard to impeachments,

the Senate can try none but such as will be brought before them by the House of Representatives.

The Senate can make no treaties ; they can approve of none unless the President of the United States lay it before them. With regard to the appointment of officers, the President must nominate before they can vote: so that if the powers of either branch are perverted, it must be with the approbation of some one of the other branches of government: thus checked on each side, they can do no one act of themselves.

“The powers of Congress extend to taxation—to direct taxation—to internal taxation—to poll-taxes—to excises—to other state and internal purposes.” Those who possess the power to tax, possess all other sovereign power. That their powers are thus extensive is admitted ; and would any thing short of this have been sufficient? Is it the wish of these gentlemen? If it is, let us hear their sentiments—that the general government should subsist on the bounty of the states. Shall it have the power to contract, and no power to fulfil the contract? Shall it have the power to borrow money, and no power to pay the principal or interest? Must we go on, in the tract that we have hitherto pursued? and must we again compel those in Europe, who lent us money in our distress, to advance the money to pay themselves interest on the certificates of the debts due to them?

This was actually the case in Holland, the last year.—Like those who have shot one arrow, and cannot regain it, they have been obliged to shoot another in the same direction, in order to recover the first. It was absolutely necessary, Sir, that this government should possess these rights, and why should it not as well as the state-governments? Will this government be fonder of the exercise of this authority than those of the states are? Will the states who are equally represented in one branch of the legislature, be more opposed to the payment of what shall be required by the future, than what has been required by the present Congress? Will the people, who must indisputably pay the whole, have more objections to the payment of this tax, because it is laid by persons of their own immediate appointment, even if those taxes were to continue as oppressive as they now are? But under the general power of this system, that cannot be the case in Pennsylvania. Throughout the union, direct taxation will

be lessened, at least in proportion to the increase of the other objects of revenue.—In this constitution, a power is given to Congress to collect imposts, which is not given by the present articles of confederation. A very considerable part of the revenue of the United States will arise from that source; it is the easiest, most just, and most productive mode of raising revenue; and it is a safe one, because it is voluntary. No man is obliged to consume more than he pleases, and each buys in proportion only to his consumption. The price of the commodity is blended with the tax, and the person is often not sensible of the payment. But would it have been proper to have rested the matter there? Suppose this fund should not prove sufficient, ought the publick debts to remain unpaid? Or the exigencies of government be left unprovided for? Should our tranquillity be exposed to the assaults of foreign enemies, or violence among ourselves, because the objects of commerce may not furnish a sufficient revenue to secure them all? Certainly Congress should possess the power of raising revenue from their constituents, for the purpose mentioned in the eighth section of the first article, that is “to pay the debts and provide for the defence and general welfare of the United States.” It has been common with the gentlemen on this subject, to present us with frightful pictures. We are told of the hosts of tax-gatherers that will swarm through the land; and whenever taxes are mentioned, military force seems to be an attending idea. I think I may venture to predict, that the taxes of the general government, if any shall be laid, will be more equitable, and much less expensive, than those imposed by the state-government.

I shall not go into an investigation of this subject; but it must be confessed, that scarcely any mode of laying and collecting taxes can be more burthensome than the present.

Another objection is, “that Congress may borrow money, keep up standing armies, and command the militia.” The present Congress possesses the power of borrowing money and of keeping up standing armies. Whether it will be proper at all times to keep up a body of troops, will be a question to be determined by Congress; but I hope the necessity will not subsist at all times; but if it should subsist, where is the gentleman that will say that they ought not to possess the necessary power of keeping them up?

It is urged as a general objection to this system, that "the powers of Congress are unlimited and undefined, and that they will be the judges, in all cases, of what is necessary and proper for them to do." To bring this subject to your view, I need do no more than point to the words in the constitution, beginning at the 8th sect. art. 1st. "The Congress (it says) shall have power, &c." I need not read over the words, but I leave it to every gentleman to say whether the powers are not as accurately and minutely defined, as can be well done on the same subject, in the same language. The old constitution is as strongly marked on this subject; and even the concluding clause, with which so much fault has been found, gives no more, or other powers; nor does it in any degree go beyond the particular enumeration; for when it is said, that Congress shall have power to make all laws which shall be necessary and proper, those words are limited, and defined by the following, "for carrying into execution the foregoing powers." It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.

I shall not detain the house, at this time, with any further observations on the liberty of the press, until it is shown that Congress have any power whatsoever to interfere with it, by licensing it, or declaring what shall be a libel.

I proceed to another objection, which was not so fully stated as I believe it will be hereafter; I mean the objection against the judicial department. The gentleman from Westmoreland only mentioned it to illustrate his objection to the legislative department. He said "that the judicial powers were co-extensive with the legislative powers, and extend even to capital cases." I believe they ought to be co-extensive, otherwise laws would be framed, that could not be executed. Certainly, therefore, the executive and judicial departments ought to have power commensurate to the extent of the laws; for, as I have already asked, are we to give power to *make* laws, and no power to *carry them into effect*?

I am happy to mention the punishment annexed to one crime. You will find the current running strong in favour of humanity. For this is the first instance in which it has not been left to the legislature, to extend the crime and punishment of treason so far

as they thought proper. This punishment, and the description of this crime, are the great sources of danger and persecution, on the part of government against the citizen. Crimes against the state! and against the officers of the state! History informs us, that more wrong may be done on this subject than on any other whatsoever. But under this constitution, there can be no treason against the United States, except such as is defined in this constitution. The manner of trial is clearly pointed out; the positive testimony of two witnesses to the same overt act, or a confession in open court, is required to convict any person of treason. And after all, the consequences of the crime shall extend no further than the life of the criminal; for no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

I come now to consider the last set of objections that are offered against this constitution. It is urged, that this is not such a system as was within the powers of the convention; they assumed the *power of proposing*. I believe they might have made proposals without going beyond their powers. I never heard before, that to make a proposal was an exercise of power. But if it is an exercise of power, they certainly did assume it; yet they did not act as that body who framed the present constitution of Pennsylvania acted; they did not by an ordinance, attempt to rivet the constitution on the people, before they could vote for members of assembly under it. Yet such was the effect of the ordinance that attended the constitution of this commonwealth. I think the late convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this constitution, proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint: it is laid before them, to be judged by the natural, civil and political rights of men. By their *FIAT*, it will become of value and authority; without it, it will never receive the character of authenticity and power. The business, we are told, which was entrusted to the late convention, was merely to amend the present articles of confederation. This observation has been frequently made, and has often brought to my mind, a story that is

related of Mr. Pope, who it is well known, was not a little deformed. It was customary with him, to use this phrase, "God mend me," when any little accident happened. One evening a link boy was lighting him along, and coming to a gutter, the boy jumped nimbly over it—Mr. Pope called to him to turn, adding, "God mend me." The arch rogue turned to light him—looked at him, and repeated "God mend you! he would sooner make half-a-dozen new ones." This would apply to the present confederation; for it would be easier to make another than to mend this. The gentlemen urge, that this is such a government as was not expected by the people, the legislatures, nor by the honourable gentlemen who mentioned it. Perhaps it was not such as was expected, *but it may be better*; and is that a reason why it should not be adopted? It is not worse, I trust, than the former. So that the argument of its being a system not expected, is an argument more strong in its favour than against it. The letter which accompanies this constitution, must strike every person with the utmost force: "The friends of our country have long seen and desired that the power of war, peace, and treaties, that of levying money and regulating commerce, and the corresponding executive and judicial authorities, should be fully and effectually vested in the general government of the union; but the impropriety of delegating such extensive trust to one body of men, is evident. *Hence results the necessity of a different organization.*" I therefore do not think that it can be urged as an objection against this system, that it was not expected by the people. We are told, to add greater force to these objections, that they are not on local but on general principles, and that they are uniform throughout the United States. I confess I am not altogether of that opinion; I think some of the objections are inconsistent with others, arising from a different quarter, and I think some are inconsistent even with those derived from the same source. But, on this occasion, let us take the fact for granted, that they are all on general principles, and uniform throughout the United States.—Then we can judge of their full amount; and what are they but *trifles light as air*? We see the whole force of them; for according to the sentiments of opposition, they can no where be stronger, or more fully stated than here. The conclusion, from all these objections, is reduced to a point, and

the plan is declared to be inimical to our liberties. I have said nothing, and mean to say nothing, concerning the dispositions or characters of those that framed the work now before you. I agree that it ought to be judged by its own intrinsic qualities. If it has not merit, weight of character ought not to carry it into effect. On the other hand, if it has merit, and is calculated to secure the blessings of liberty, and to promote the general welfare, then such objections as have hitherto been made, ought not to influence us to reject it.

I am now led to consider those qualities that this system of government possesses, which will entitle it to the attention of the United States. But as I have somewhat fatigued myself, as well as the patience of the honourable members of this house, I shall defer what I have to add on this subject until the afternoon.

Eodem die, P. M.

MR. WILSON.—Before I proceed to consider those qualities in the constitution before us, which I think will ensure it our approbation, permit me to make some remarks, and they shall be very concise, upon the objections that were offered this forenoon, by the member from Fayette (Mr. Smilie.) I do it, at this time, because I think it will be better to give a satisfactory answer to the whole of the objections, before I proceed to the other part of my subject. I find that the doctrine of a single legislature is not to be contended for in this constitution. I shall therefore say nothing on that point. I shall consider that part of the system, when we come to view its excellencies. Neither shall I take particular notice of his observation on the qualified negative of the President; for he finds no fault with it; he mentions, however, that he thinks it a vain and useless power, because it can never be executed. The reason he assigns for this is, that the King of Great Britain, who has an absolute negative over the laws proposed by Parliament, has never exercised it, at least, not for many years. It is true, and the reason why he did not exercise it, was, that during all that time, the King possessed a negative before the bill had passed through the two houses; a much stronger power than a negative after debate. I believe, since the revolution, at the time of William the third it was never known, that a bill disagreeable to the crown, passed both houses. At

one time in the reign of Queen Anne, when there appeared some danger of this being effected, it is well known that she created twelve peers, and by that means effectually defeated it.—Again; there was some risk of late years in the present reign, with regard to Mr. Fox's East India bill, as it is usually called, that passed through the House of Commons, but the King had interest enough in the House of Peers, to have it thrown out; thus it never came up for the royal assent. But that is no reason why this negative should not be exercised here, and exercised with great advantage. Similar powers are known in more than one of the states. The governours of Massachusetts and New York have a power similar to this; and it has been exercised frequently to good effect.

I believe the governour of New York, under this power, has been known to send back five or six bills in a week; and I well recollect that at the time the funding system was adopted by our legislature, the people in that state considered the negative of the governour as a great security, that their legislature would not be able to incumber them by a similar measure. Since that time an alteration has been supposed in the governour's conduct, but there has been no alteration in his power.

The honourable gentleman from Westmoreland (Mr. Findley) by his highly refined critical abilities, discovers an inconsistency in this part of the constitution, and that which declares in section first: "all legislative powers, herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives," and yet here, says he, is a power of legislation given to the President of the United States, because every bill, before it becomes a law, shall be presented to him: thus he is said to possess legislative powers. Sir, the convention observed on this occasion strict propriety of language; "if he approve the bill when it is sent, he shall sign it, but if not he shall return it;" but no bill passes in consequence of having his assent—therefore he possesses no legislative authority.

The effect of his power, upon this subject, is merely this, if he disapproves a bill, two thirds of the legislature become necessary, to pass it into a law, instead of a bare majority. And when two thirds are in favour of the bill, it becomes a law, not by his, but by authority of the two houses of the legislature. We are told, in the next place, by the honourable gentleman from Fay-

ette (Mr. Smilie) that in the different orders of mankind, there is that of a natural aristocracy. On some occasions, there is a kind of magical expression, used to conjure up ideas, that may create uneasiness and apprehension. I hope the meaning of the words is understood by the gentleman who used them.—I have asked repeatedly of the gentleman to explain, but have not been able to obtain the explanation of what they meant by a consolidated government.—They keep round and round about the thing, but never define. I ask now what is meant by a natural aristocracy? I am not at a loss for the etymological definition of the term; for, when we trace it to the language from which it is derived, an aristocracy means nothing more or less than a government of the best men in the community, or those who are recommended by the words of the constitution of Pennsylvania, where it is directed, that the representatives should consist of those most noted for wisdom and virtue. Is there any danger in such representation? I shall never find fault, that such characters are employed. Happy for us, when such characters can be obtained.—If this is meant by a natural aristocracy, and I know no other, can it be objectionable, that men should be employed that are most noted for their virtue and talents?—And are attempts made to mark out these as the most improper persons for the publick confidence?

I had the honour of giving a definition, and I believe it was a just one, of what is called an aristocratick government. It is a government where the supreme power is not retained by the people, but resides in a select body of men, who either fill up the vacancies that happen, by their own choice and election, or succeed on the principle of descent, or by virtue of territorial possessions, or some other qualifications that are not the result of personal properties. When I speak of personal properties, I mean the qualities of the head and the disposition of the heart.

We are told that the representatives will not be known to the people, nor the people to the representatives, because they will be taken from large districts where they cannot be particularly acquainted. There has been some experience in several of the states, upon this subject, and I believe the experience of all who have had experience, demonstrates that the larger the district of election, the better the representation. It is only in re-

mote corners of a government, that little demagogues arise. Nothing but real weight of character, can give a man real influence over a large district. This is remarkably shown in the commonwealth of Massachusetts. The members of the House of Representatives, are chosen in very small districts, and such has been the influence of party cabal and little intrigue in them, that a great majority seem inclined to show very little disapprobation of the conduct of the insurgents in that state.

The governour is chosen by the people at large, and that state is much larger than any district need be under the proposed constitution. In their choice of their governour, they have had warm disputes; but however warm the disputes, their choice only vibrated between the most eminent characters. Four of their candidates are well known; Mr. Hancock, Mr. Bowdoin, general Lincoln, and Mr. Gorham, the late president of Congress.

I apprehend it is of more consequence to be able to know the true interest of the people, than their faces, and of more consequence still, to have virtue enough to pursue the means of carrying that knowledge usefully into effect. And surely when it has been thought hitherto, that a representation in Congress of from five to two members, was sufficient to represent the interest of this state, is it not more than sufficient to have ten members in that body? And those in a greater comparative proportion than heretofore? The citizens of Pennsylvania will be represented by eight, and the state by two. This, certainly, though not gaining enough, is gaining a good deal; the members will be more distributed through the state, being the immediate choice of the people, who hitherto have not been represented in that body. It is said that the House of Representatives will be subject to corruption, and the Senate possess the means of corrupting, by the share they have in the appointment to office. This was not spoken in the soft language of attachment to government. It is perhaps impossible, with all the caution of legislators and statesmen, to exclude corruption and undue influence entirely from government. All that can be done, upon this subject, is done in the constitution before you. Yet it behoves us to call out, and add, every guard and preventative in our power. I think, Sir, something very important, on this subject, is done

in the present system. For it has been provided, effectually, that the man that has been bribed by an office, shall have it no longer in his power to earn his wages. The moment he is engaged to serve the Senate, in consequence of their gift, he no longer has it in his power to sit in the House of Representatives. For "no representative shall, during the term for which he was elected, be appointed to any civil office, under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time:"—and the following annihilates corruption of that kind: "And no person holding any office under the United States, shall be a member of either house, during his continuance in office." So that the mere acceptance of an office as a bribe, effectually destroys the end for which it was offered. Was this attended to when it was mentioned, that the members of the one house could be bribed by the other? "But the members of the Senate may enrich themselves," was an observation, made as an objection to this system. As the mode of doing this has not been pointed out, I apprehend the objection is not much relied upon. The Senate are incapable of receiving any money, except what is paid them out of the publick treasury. They cannot vote to themselves a single penny, unless the proposition originates from the other house. This objection therefore is visionary, like the following one, "that pictured groupe, that numerous host, and prodigious swarm of officers, which are to be appointed under the general government." The gentlemen tell you that there must be judges of the supreme, and judges of the inferior courts, with all their appendages:—there will be tax-gatherers swarming throughout the land. Oh! say they, if we could enumerate the offices, and the numerous officers that must be employed every day, in collecting and receiving, and comptrolling the monies of the United States, the number would be almost beyond imagination. I have been told, but I do not vouch for the fact, that there are in one shape or another, more than a thousand persons in this very state, who get their living in assessing and collecting our revenues from the other citizens. Sir, when this business of revenue is conducted on a general plan, we may be able to do the business of the thirteen states, with an equal, nay, with a less number—instead of thirteen comptroller-generals,

one comptroller will be sufficient ; I apprehend, that the number of officers, under this system, will be greatly reduced from the number now employed. For as Congress can now do nothing effectually, the states are obliged to do every thing. And in this very point, I apprehend, that we shall be great gainers.

Sir, I confess I wish the powers of the Senate were not as they are. I think it would have been better if those powers had been distributed in other parts of the system. I mentioned some circumstances in the forenoon, that I had observed on this subject. I may mention now, we may think ourselves very well off, Sir, that things are as well as they are, and that that body is even so much restricted. But surely objections of this kind come with a bad grace from the advocates, or those who prefer the present confederation, and who wish only to increase the powers of the present Congress. A single body not constituted with checks, like the proposed one, who possess not only the power of making treaties, but executive powers, would be a perfect despotism ; but, further, these powers are, in the present confederation, possessed without control.

As I mentioned before, so I will beg leave to repeat, that this Senate can do nothing without the concurrence of some other branch of the government. With regard to their concern in the appointment to offices, the President must nominate before they can be chosen ; the President must acquiesce in that appointment. With regard to their power in forming treaties, they can make none, they are only auxiliaries to the President. They must try all impeachments ; but they have no power to try any until presented by the House of Representatives ; when I consider this subject, though I wish the regulations better, I think no danger to the liberties of this country can arise even from that part of the system. But these objections, I say, come with a bad grace from those who prefer the present confederation, who think it only necessary to add more powers to a body organized in that form. I confess, likewise, that by combining those powers, of trying impeachments, and making treaties, in the same body, it will not be so easy as I think it ought to be, to call the senators to an account for any improper conduct in that business.

Those who proposed this system, were not inattentive to do all they could. I admit the force of the observation, made by

the gentleman from Fayette (Mr. Smilie) that when two thirds of the Senate concur in forming a bad treaty, it will be hard to procure a vote of two thirds against them, if they should be impeached. I think such a thing is not to be expected ; and so far they are without that *immediate* degree of responsibility, which I think requisite, to make this part of the work perfect. But this will not be *always* the case. When a member of the Senate shall behave criminally, the criminality will not expire with his office. The senators may be called to account after they shall have been changed, and the body to which they belonged shall have been altered. There is a rotation ; and every second year one third of the whole number go out. Every fourth year two thirds of them are changed. In six years the whole body is supplied by a new one. Considering it in this view, responsibility is not entirely lost. There is another view in which it ought to be considered, which will show that we have a greater degree of security. Though they may not be convicted on impeachment before the Senate, they may be tried by their country : and if their criminality is established, the law will punish. A grand jury may present, a petty jury may convict, and the judges will pronounce the punishment. This is all that can be done under the present confederation, for under it there is no power of impeachment ; even here then we gain something. Those parts that are exceptionable in this constitution, are improvements on that concerning which so much pains are taken to persuade us, that it is preferable to the other.

The last observation respects the judges. It is said that if they dare to decide against the law, one house will impeach them, and the other will convict them. I hope gentlemen will show how this can happen, for bare supposition ought not to be admitted as proof. The judges are to be impeached, because they decide an act null and void, that was made in defiance of the constitution ! What House of Representatives would dare to impeach, or Senate to commit judges for the performance of their duty ? These observations are of a similar kind to those with regard to the liberty of the press.

I will now proceed to take some notice of those qualities in this constitution, that I think entitle it to our respect and favour. I have not yet done, Sir, with the great principle on which it

stands ; I mean the practical recognition of this doctrine, that in the United States the people retain the supreme power.

In giving a definition of the simple kinds of government known throughout the world, I had occasion to describe what I meant by a democracy ; and I think I termed it, that government in which the people retain the supreme power, and exercise it either collectively or by representation—this constitution declares this principle in its terms, and in its consequences, which is evident from the manner in which it is announced.—“**WE THE PEOPLE OF THE UNITED STATES.**” After all the examination, which I am able to give the subject, I view this as the only sufficient and the most honourable basis, both for the people and government, on which our constitution can possibly rest. What are all the contrivances of states of kingdoms and empires?—What are they all intended for ? They are all intended for man, and our natural character and natural rights are certainly to take place, in preference to all artificial refinements that human wisdom can devise.

I am astonished to hear the ill-founded doctrine, that states alone ought to be represented in the federal government: these must possess sovereign authority forsooth, and the people be forgot—No—Let us *reascend* to first principles—That expression is not strong enough to do my ideas justice. Let us **RETAIN** first principles. The people of the United States are now in the possession and exercise of their original rights, and while this doctrine is known, and operates, we shall have a cure for every disease.

I shall mention another good quality, belonging to this system.—In it the legislative, executive and judicial powers, are kept nearly independent and distinct. I express myself in this guarded manner, because I am aware of some powers that are blended in the Senate. They are but few ; and they are not dangerous. It is an exception, yet that exception consists of but few instances, and none of them dangerous.—I believe in no constitution for any country on earth is this great principle so strictly adhered to, or marked with so much precision and accuracy, as in this. It is much more accurate, than that which the honourable gentleman so highly extols ; I mean the constitution of England.—There, Sir, one branch of the legislature can appoint the mem-

bers of another. The King has the power of introducing members into the House of Lords. I have already mentioned that in order to obtain a vote, twelve peers were poured into that house at one time; the operation is the same as might be under this constitution, if the President had a right to appoint the members of the Senate. This power of the King's extends into the other branch, where, though he cannot immediately introduce a member, yet he can do it remotely by virtue of his prerogative, as he may create boroughs with power to send members to the House of Commons. The House of Lords form a much stronger exception to this principle than the Senate in this system; for the House of Lords possess judicial powers, not only that of trying impeachments, but that of trying their own members, and civil causes when brought before them, from the Courts of Chancery, and the other courts in England.

If we therefore consider this constitution, with regard to this special object, though it is not so perfect as I would wish, yet it is more perfect than any other government that I know.

I proceed to another property which I think will recommend it to those who consider the effects of beneficence and wisdom. I mean the *division of this legislative authority* into two branches. I had an opportunity of dilating somewhat on this subject before. And as it is not likely to afford a subject of debate, I shall take no further notice of it, than barely to mention it. The next good quality, that I remark, is, that the *executive authority is one*; by this means we obtain very important advantages. We may discover from history, from reasoning and from experience, the security which this furnishes. The executive power is better to be trusted when it has no *screen*. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence, or inattention; he cannot roll upon any other person the weight of his criminality: no appointment can take place without his nomination; and he is responsible for every nomination he makes. We secure *vigour*; we well know what numerous executives are.—We know there is neither vigour, decision nor responsibility in them. Add to all this—That officer is placed high, and is possessed of power, far from being contemptible, yet not a *single privilege* is annexed to his character; far from being *above the laws*, he is *amena-*

ble to them in his *private character* as a citizen, and in his public character by impeachment.

Sir, it has often been a matter of surprise, and frequently complained of even in Pennsylvania, that the independence of the judges is not properly secured. The servile dependence of the judges, in some of the states, that have neglected to make proper provision on this subject, endangers the liberty and property of the citizen; and I apprehend that whenever it has happened, that the appointment has been for a less period than during good behaviour, this object has not been sufficiently secured—for if every five or seven years, the judges are obliged to make court for a re-appointment to office, they cannot be styled independent. This is not the case with regard to those appointed under the general government. For the judges here shall hold their offices during good behaviour—I hope no further objections will be taken, against this part of the constitution, the consequence of which will be, that private property (so far as it comes before their courts)—and personal liberty, so far as it is not forfeited by crimes, will be guarded with firmness and watchfulness.

It may appear too professional to descend into observations of this kind, but I believe, that publick happiness, personal liberty and private property, depend essentially upon the able and upright determinations of independent judges.

Permit me to make one more remark on the subject of the judicial department.—Its objects are extended *beyond* the bounds or power of every particular state, and therefore must be proper objects of the general government. I do not recollect any instance where a case can come before the judiciary of the United States, that could possibly be determined by a particular state, except one, which is, where citizens of the same state claim lands under the grant of different states, and in that instance, the power of the two states necessarily comes in competition; wherefore there would be great impropriety in having it determined by either.

Sir, I think there is another subject with regard to which this constitution deserves approbation.—I mean the *accuracy* with which the *line is drawn* between the powers of the *general government*, and that of the particular *state-governments*. We have heard some general observations on this subject, from the gentlemen who conduct the opposition. They have asserted that

these powers are unlimited and undefined. These words are as easily pronounced as limited and defined. They have already been answered by my honourable colleague, (Mr. M'Kean) therefore I shall not enter into an explanation; but it is not pretended that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire. Whoever views the matter in a true light, will see that the powers are as minutely enumerated and defined as was possible, and will also discover, that the general clause, against which so much exception is taken, is nothing more, than what was necessary to render effectual the particular powers that are granted.

But let us suppose (and the supposition is very easy in the minds of the gentlemen on the other side) that there is some difficulty in ascertaining where the true line lies. Are we therefore thrown into despair? Are disputes between the general government, and the state-governments, to be necessarily the consequence of inaccuracy? I hope, Sir, they will not be the enemies of each other, or resemble comets in conflicting orbits mutually operating destruction; but that their motion will be better represented by that of the planetary system, where each part moves harmoniously within its proper sphere, and no injury arises by interference or opposition. Every part, I trust, will be considered as a part of the United States. Can any cause of distrust arise here? Is there any increase of risk? Or rather are not the enumerated powers as well defined here, as in the present articles of confederation?

Permit me to proceed to what I deem another excellency of this system—all authority of every kind is *derived by representation from the PEOPLE, and the DEMOCRATICK principle is carried into every part of the government*. I had an opportunity when I spoke first, of going fully into an elucidation of this subject. I mean not now to repeat what I then said.

I proceed to another quality that I think estimable in this system—it *secures in the strongest manner the right of suffrage*. Montesquieu, book 2d. ch. 2d. speaking of laws relative to democracy, says, “when the body of the people is possessed of the *supreme power*, this is called *democracy*. When the *supreme*

power is lodged in the hands of a part of the people, it is then an *aristocracy*."

"In a democracy the people are in some respects the sovereign, and in others the subject.

"There can be no exercise of sovereignty but by their suffrages, which are their own will: now, the sovereign's will is the sovereign himself. The laws, therefore, which establish the right of suffrage, are fundamental to this government. And indeed it is as important to regulate, in a republick, in what manner, by whom, to whom, and concerning what, suffrages are to be given, as it is in a monarchy, to know who is the prince, and after what manner he ought to govern."

In this system it is declared, that the electors in each state shall have the qualification requisite for electors of the most numerous branch of the state-legislature. This being made the criterion of the right of suffrage, it is consequently secured, because the same constitution *guarantees*, to every state in the union, a *republican* form of government. The right of suffrage is fundamental to republicks.

Sir, there is another principle that I beg leave to mention—*Representation and direct taxation*, under this constitution, are to be according to numbers. As this is a subject which I believe has not been gone into in this house, it will be worth while to show the sentiments of some respectable writers thereon. Montesquieu in considering the requisites in a confederate republick, book 9th, ch. 3d, speaking of Holland, observes, "it is difficult for the United States to be all of equal power and extent. The Lycian* republick was an association of twenty-three towns; the large ones had three votes in the Common Council, the middling ones two, and the small towns one. The Dutch republick consists of seven provinces, of different extent of territory, which have each one voice.

The cities of Lycia † contributed to the expenses of the state, according to the proportion of suffrages. The provinces of the United Netherlands cannot follow this proportion; they must be directed by that of their power.

* Strabo, lib. 14.

† Ibid

In Lycia * the judges and town-magistrates were elected by the Common Council, *and according to the proportion already mentioned*. In the republick of Holland, they are not chosen by the Common Council, but each town names its magistrates. Were I to give a model of an excellent confederate republick, I should pitch upon that of Lycia."

I have endeavoured, in all the books that I could have access to, to acquire some information relative to the Lycian republick, but its history is not to be found; the few facts that relate to it are mentioned only by Strabo; and however excellent the model it might present, we were reduced to the necessity of working without it: give me leave to quote the sentiments of another authour, whose peculiar situation and extensive worth, throws a lustre on all he says; I mean Mr. Neckar, whose ideas are very exalted both in theory and practical knowledge on this subject. He approaches the nearest to the truth in his calculations from experience, and it is very remarkable that he makes use of that expression; his words are, † "population can therefore be only looked on as an exact measure of comparison, when the provinces have resources nearly equal; but even this imperfect rule of proportion ought not to be neglected; and of all the objects which may be subjected to a determined and positive calculation, that of the taxes, to the population, approaches nearest to the truth."

Another good quality in this constitution is, that the members of the legislature *cannot hold offices under the authority of this government*. The operation of this I apprehend would be found to be very extensive, and very salutary in this country, to prevent those intrigues, those factions, that corruption, that would otherwise rise here, and have risen so plentiful in every other country. The reason why it is necessary in England to continue such influence, is that the crown, in order to secure its own influence against two other branches of the legislature, must continue to bestow places; but those *places* produce the opposition which frequently runs so strong in the British Parliament.

Members who do not enjoy offices, combine against those who do enjoy them. It is not from principle, that they thwart the ministry in all its operations. No: their language is, let us

* Strabo, lib. 14.

† Neckar on Finance, vol. 1, p. 308.

turn them out and succeed to their places.—The great source of corruption, in that country, is, that persons may hold offices under the crown, and seats in the legislature at the same time.

I shall conclude at present, and I have endeavoured to be as concise as possible, with mentioning, that in my humble opinion the powers of the general government are necessary, and well defined—that the restraints imposed on it, and those imposed on the state-governments, are rational and salutary, and that it is entitled to the approbation of those for whom it was intended.

I recollect, on a former day, the honourable gentleman from Westmoreland (Mr. Findley,) and the honourable gentleman from Cumberland (Mr. Whitehill) took exceptions against the first clause of the 9th, sect, art. 1. arguing very unfairly, that because Congress might impose a tax or duty of ten dollars on the importation of slaves, within any of the United States, Congress might therefore permit slaves to be imported within this state, contrary to its laws.—I confess I little thought that this part of the system would be excepted to.

I am sorry that it could be extended no further; but so far as it operates, it presents us with the pleasing prospect, that the rights of mankind will be acknowledged and established throughout the union.

If there was no other lovely feature in the constitution, but this one, it would diffuse a beauty over its whole countenance. Yet the lapse of a few years! and Congress will have power to exterminate slavery from within our borders.

How would such a delightful prospect expand the breast of a benevolent and philanthropick European? Would he cavil at an expression? Catch at a phrase? No, Sir, that is only reserved for the gentleman on the other side of your chair to do. What would be the exultation of that great man, whose name I have just now mentioned, we may learn from the following sentiments on this subject: they cannot be expressed so well as in his own words.*

“The colonies of France contain as we have seen, near five hundred thousand slaves, and it is from the number of these wretches, that the inhabitants set a value on their plantations.

* Vol. 1. page 329.

What a fatal prospect ! and how profound a subject for reflection ! Alas ! how inconsequent we are, both in our morality, and our principles. We preach up humanity, and yet go every year to bind in chains twenty thousand natives of Africa ! We call the Moors barbarians, and ruffians, because they attack the liberty of Europeans, at the risk of their own ; yet these Europeans go, without danger, and as mere speculators, to purchase slaves, by gratifying the cupidity of their masters ; and excite all those bloody scenes which are the usual preliminaries of this traffick ! in short, we pride ourselves on the superiority of 'man, and it is with reason that we discover this superiority, in the wonderful and mysterious unfolding of the intellectual faculties ; and yet a trifling difference in the hair of the head, or in the colour of the epidermis, is sufficient to change our respect into contempt, and to engage us to place beings like ourselves, in the rank of those animals devoid of reason, whom we subject to the yoke ; that we may make use of their strength, and of their instinct, at command.

“ I am sensible, and I grieve at it, that these reflections which others have made much better than me, are unfortunately of very little use ! The necessity of supporting sovereign power has its peculiar laws, and the wealth of nations is one of the foundations of this power : thus the sovereign who should be the most thoroughly convinced of what is due to humanity, would not singly renounce the service of slaves in his colonies ; time alone could furnish a population of free people to re-place them, and the great difference that would exist in the price of labour, would give so great an advantage to the nation that should adhere to the old custom, that the others would soon be discouraged in wishing to be more virtuous. And yet, would it be a chimerical project to propose a general compact, by which all the European nations should unanimously agree to abandon the traffick of African slaves ! they would in that case, find themselves exactly in the same proportion relative to each other as at present ; for it is only on comparative riches that the calculations of power are founded.

“ We cannot as yet indulge such hopes ; statesmen in general, think that every common idea must be a low one ; and since the morals of private people stand in need of being curbed, and main-

tained by the laws, we ought not to wonder, if those of sovereigns conform to their independence.

“The time may nevertheless arrive, when, fatigued of that ambition which agitates them, and of the continual rotation of the same anxieties, and the same plans, they may turn their views to the great principles of humanity; and if the present generation is to be witness of this happy revolution, they may at least be allowed to be unanimous in offering up their vows for the perfection of the social virtues, and for the progress of public beneficial institutions,” these are the enlarged sentiments of that great man.

Permit me to make a single observation in this place on the restraints placed on the state-governments; if only the following lines were inserted in this constitution, I think it would be worth our adoption. “No state shall hereafter *emit bills of credit*;—make any thing but gold and silver coin, a *tender* in payment of debts; pass any bills of attainder; ex post facto laws; or *law impairing the obligation of contracts*.” Fatal experience has taught us, dearly taught us! the value of these restraints.—What is the consequence even at this moment? It is true we have no tender-law in Pennsylvania; but the moment you are conveyed across the Delaware you find it haunt your journey and follow close upon your heels.—The paper passes commonly at twenty-five or thirty per centum discount; how insecure is property!

These are a few of those properties in this system, that I think recommend it to our serious attention, and will entitle it to receive the adoption of the United States. Others might be enumerated, and others still will probably be disclosed by experience.

Friday, December 7, 1787, A. M.

MR. WILSON.—This is the first time that the article respecting the judicial department, has come directly before us. I shall therefore take the liberty of making such observations, as will enable honourable gentlemen to see the extent of the views of the convention in forming this article, and the extent of its probable operation.

This will enable gentlemen to bring before this house their objections more pointedly, than, without any explanation, could

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be done. Upon a distinct examination of the different powers, I presume it will be found, that not one of them is unnecessary. I will go further—there is not one of them but will be discovered to be of such a nature, as to be attended with very important advantages. I shall beg leave to premise one remark, that the convention, when they formed this system, did not expect they were to deliver themselves, their relations and their posterity, into the hands of such men, as are described by the honourable gentlemen in opposition. They did not suppose that the legislature, under this constitution, would be an *association of demons*; they thought that a proper attention would be given by the citizens of the United States, at the general election, for members to the House of Representatives; they also believed, that the particular states would nominate as good men as they have heretofore done, to represent them in the Senate. If they should now do otherwise, the fault will not be in Congress, but in the people, or states themselves. I have mentioned oftener than once, that for a people wanting to themselves, there is no remedy.

The convention thought further—for on this very subject, there will appear caution instead of imprudence in their transactions—they considered, that if suspicions are to be entertained, they are to be entertained with regard to the objects in which government have separate interests and separate views, from the interests and views of the people. To say that officers of government will oppress, when nothing can be got by oppression, is making an inference, bad as human nature is, that cannot be allowed. When persons can derive no advantage from it, it can never be expected they will sacrifice either their duty or their popularity.

Whenever the general government can be a party against a citizen, the trial is guarded and secured in the constitution itself, and therefore it is not in its power to oppress the citizen. In the case of treason, for example, though the prosecution is on the part of the United States, yet the Congress can neither define nor try the crime. If we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people, has arisen from the extension of the definition of treason. Some very re-

markable instances have occurred, even in so free a country as England. If I recollect right, there is one instance that puts this matter in a very strong point of view. A person possessed a favourite buck, and on finding it killed, wished the horns in the belly of the person who killed it; this happened to be the King; the injured complainant was tried and convicted of treason, for wishing the King's death.

I speak only of free governments, for in despotick ones, treason depends entirely upon the will of the Prince. Let this subject be attended to, and it will be discovered where the dangerous power of the government operates to the oppression of the people. Sensible of this, the convention has guarded the people against it, by a particular and accurate definition of treason.

It is very true, that trial by jury is not mentioned in civil cases; but I take it, that it is very improper to infer from hence, that it was not meant to exist under this government. Where the people are represented—where the interest of government cannot be separate from that of the people, (and this is the case in trial between citizen and citizen) the power of making regulations with respect to the mode of trial, may certainly be placed in the legislature; for I apprehend that the legislature will not do wrong in an instance, from which they can derive no advantage. These were not all the reasons that influenced the convention to leave it to the future Congress to make regulations on this head.

By the constitution of the different states, it will be found that no particular mode of trial by jury could be discovered that would suit them all. The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings, are all different, in the different states; and I presume it will be allowed a good general principle, that in carrying into effect the laws of the general government by the judicial department, it will be proper to make the regulations as agreeable to the habits and wishes of the particular states as possible; and it is easily discovered that it would have been impracticable, by any general regulation, to have given satisfaction to all. We must have thwarted the custom of eleven or twelve to have accommodated any one. Why do this, when there was no danger to be apprehended from the omission? We could not go

into a particular detail of the manner that would have suited each state.

Time, reflection and experience, will be necessary to suggest and mature the proper regulations on this subject ; time and experience were not possessed by the convention ; they left it therefore to be particularly organized by the legislature—the representatives of the United States, from time to time, as should be most eligible and proper. Could they have done better ?

I know in every part, where opposition has risen, what a handle has been made of this objection ; but I trust upon examination it will be seen that more could not have been done with propriety. Gentlemen talk of bills of rights ! What is the meaning of this continual clamour, after what has been urged, though it may be proper in a single state, whose legislature calls itself the sovereign and supreme power ? Yet it would be absurd in the body of the people, when they are delegating from among themselves persons to transact certain business, to add an enumeration of those things, which they are not to do. “ But trial by jury is secured in the bill of rights of Pennsylvania ; the parties have a right to trials by jury, which ought to be held sacred,” and what is the consequence ? There has been more violations of this right in Pennsylvania, since the revolution, than are to be found in England, in the course of a century.

I hear no objection made to the tenure by which the judges hold their offices. It is declared that the judges shall hold them during good behaviour ; nor to the security which they will have for their salaries. They shall at stated times receive for their services, a compensation which shall not be diminished during their continuance in office.

The article respecting the judicial department, is objected to as going too far, and is supposed to carry a very indefinite meaning. Let us examine this—the judicial power shall extend to all cases in law and equity, *arising under this constitution and the laws of the United States*. Controversies may certainly arise under this constitution and the laws of the United States, and is it not proper that there should be judges to decide them ? The honourable gentleman from Cumberland (Mr. Whitehill) says, that laws may be made inconsistent with the constitution ; and that therefore the powers given to the judges, are dangerous ;

for my part, Mr. president, I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the constitution predominates. Any thing therefore, that shall be enacted by Congress contrary thereto, will not have the force of law.

The judicial power extends to all cases arising under treaties made, or which shall be made, by the United States. I shall not repeat, at this time, what has been said with regard to the power of the states to make treaties; it cannot be controverted, that when made, they ought to be observed. But it is highly proper that this regulation should be made, for the truth is, and I am sorry to say it, that in order to prevent the payment of British debts, and from other causes, our treaties have been violated, and violated too by the express laws of several states in the union. Pennsylvania, to her honour be it spoken, has hitherto done no act of this kind: but it is acknowledged, on all sides, that many states in the union have infringed the treaty; and it is well known, that when the minister of the United States made a demand of Lord Carmarthen, of a surrender of the western posts, he told the minister, with truth and justice, "the treaty, under which you claim those possessions, has not been performed on your part: until that is done those possessions will not be delivered up." This clause, Sir, will show the world, that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry them into effect, let the legislatures of the different states do what they may.

The power of the judges extends to all cases affecting ambassadors, other publick ministers and consuls. I presume very little objection will be offered to this clause; on the contrary, it will be allowed proper and unexceptionable.

This will also be allowed with regard to the following clause, "all cases of admiralty and maritime jurisdiction."

The next is "to controversies to which the United States shall be a party." Now I apprehend it is something very incon-

gruous, that, because the United States are a party, it should be urged, as an objection, that their judges ought not to decide, when the universal practice of all nations have and unavoidably must admit of this power. But say the gentlemen, the sovereignty of the states is destroyed, if they should be engaged in a controversy with the United States, because a suitor in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner. The answer is plain and easy: the government of each state ought to be subordinate to the government of the United States.

“To controversies between two or more states:” This power is vested in the present Congress, but they are unable, as I have already shown, to enforce their decisions. The additional power of carrying their decrees into execution, we find is therefore necessary, and I presume no exception will be taken to it.

“Between a state, and citizens of another state:” When this power is attended to, it will be found to be a necessary one. Impartiality is the leading feature in this constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal, where both parties may stand on a just and equal footing.

“Between citizens of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects:” This part of the jurisdiction, I presume, will occasion more doubt than any other part, and at *first view* it may seem exposed to objections well-founded and of great weight; but I apprehend this can be the case only at *first view*. Permit me to observe here, with regard to this power, or any other of the foregoing powers given to the federal court, that they are not exclusively given. In all instances the parties may commence suits in the courts of the several states. Even the United States may submit to such decision if they think proper. Though the citizens of a state, and the citizens or subjects of foreign states, *may* sue in the federal court, it does not follow that they *must* sue. These are the instances in which the jurisdiction of the United States may be exercised; and we have all the reason in the world to believe, that it will be exercised impartially; for it would be improper to infer, that the judges would abandon their duty, the rather for being in-

dependent. Such a sentiment is contrary to experience, and ought not to be hazarded. If the people of the United States are fairly represented, and the President and Senate are wise enough to choose men of abilities and integrity for judges, there can be no apprehension; because, as I mentioned before, the government can have no interest in injuring the citizens.

But when we consider the matter a little further, is it not necessary, if we mean to restore either publick or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask, how a merchant must feel to have his property lay at the mercy of the laws of Rhode Island? I ask further, how will a creditor feel, who has his debts at the mercy of tender-laws in other states? It is true, that under this constitution, these particular iniquities may be restrained in future; but, Sir, there are other ways of avoiding payment of debts. There have been instalment-acts, and other acts of a similar effect. Such things, Sir, destroy the very sources of credit.

Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general governments.

I will mention further, an object that I take to be of particular magnitude, and I conceive these regulations will produce its accomplishment. The object, Mr. president, that I allude to, is the improvement of our domestick navigation, the instrument of trade between the several states. That decay of private credit which arose from the destruction of publick credit, by a too inefficient general government, will be restored, and this valuable intercourse among ourselves, must give an increase to those useful improvements, that will astonish the world. At present, how are we circumstanced! Merchants of eminence will tell you, that they can trust their correspondents without law; but they cannot trust the laws of the state in which their correspondents live. Their friend may die, and may be succeeded by a representative of a very different character. If there is any particular objection that did not occur to me on this part of the constitution, gentlemen will mention it; and I hope when this article

is examined, it will be found to contain nothing but what is proper to be annexed to the general government. The next clause, so far as it gives original jurisdiction in cases affecting ambassadors, I apprehend is perfectly unexceptionable.

It was thought proper to give the citizens of foreign states full opportunity of obtaining justice in the general courts, and this they have by its appellate jurisdiction; therefore, in order to restore credit with those foreign states, that part of the article is necessary. I believe the alteration that will take place in their minds, when they learn the operation of this clause, will be a great and important advantage to our country, nor is it any thing but justice; they ought to have the same security against the state-laws that may be made, that the citizens have; because regulations ought to be equally just in the one case as in the other. Further, it is necessary, in order to preserve peace with foreign nations. Let us suppose the case, that a wicked law is made in some one of the states, enabling a debtor to pay his creditor with the fourth, fifth, or sixth part of the real value of the debt, and this creditor, a foreigner, complains to his prince or sovereign, of the injustice that has been done him: what can that prince or sovereign do? Bound by inclination as well as duty to redress the wrong his subject sustains from the hand of perfidy, he cannot apply to the particular guilty state, because he knows that by the articles of confederation, it is declared that no state shall enter into treaties. He must therefore apply to the United States: the United States must be accountable: "My subject has received a flagrant injury; do me justice, or I will do myself justice." If the United States are answerable for the injury, ought they not to possess the means of compelling the faulty state to repair it? They ought, and this is what is done here. For now, if complaint is made in consequence of such injustice, Congress can answer, "Why did not your subject apply to the general court, where the unequal and partial laws of a particular state would have had no force?"

In two cases the Supreme Court has original jurisdiction; that affecting ambassadors, and when a state shall be a party. It is true, it has appellate jurisdiction in more, but it will have it under such restrictions as the Congress shall ordain. I believe that any gentleman, possessed of experience or knowledge on

this subject, will agree that it was impossible to go further with any safety or propriety, and that it was best left in the manner in which it now stands.

“In all the other cases beforementioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact.” The jurisdiction as to fact, may be thought improper, but those possessed of information on this head, see that it is necessary. We find it essentially necessary from the ample experience we have had in the Courts of Admiralty with regard to captures. Those gentlemen, who during the late war, had their vessels retaken, know well what a poor chance they would have had, when those vessels were taken into other states and tried by juries, and in what a situation they would have been, if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdict of those juries. Attempts were made by some of the states to destroy this power, but it has been confirmed in every instance.

There are other cases in which it will be necessary; and will not Congress better regulate them as they rise from time to time, than could have been done by the convention? Besides, if the regulations shall be attended with inconvenience, the Congress can alter them as soon as discovered. But any thing done in convention, must remain unalterable, but by the power of the citizens of the United States at large.

I think these reasons will show, that the powers given to the Supreme Court, are not only safe, but constitute a wise and valuable part of this system.

Tuesday, December 11, 1787, A. M.

MR. WILSON.—Three weeks have now elapsed since this convention met: some of the delegates attended on Tuesday the 20th November; a great majority within a day or two afterwards, and all but one on the 4th day. We have been since employed in discussing the business for which we are sent here. I think it will now become evident to every person who takes a candid view of our discussions, that it is high time our proceedings should draw towards a conclusion. Perhaps our debates have already continued as long, nay, longer than is sufficient for every good purpose. The business which we were intended to perform

is necessarily reduced to a very narrow compass. The single question to be determined is, shall we assent to and ratify the constitution proposed?

As this is the first state whose convention has met on the subject, and as the subject itself is of very great importance not only to Pennsylvania, but to the United States, it was thought proper, fairly, openly and candidly, to canvass it. This has been done. You have heard, Mr. president, from day to day, and from week to week, the objections that could be offered from any quarter. We have heard those objections once—we have heard a great number of them repeated much oftener than once. Will it answer any valuable end, Sir, to protract these debates longer? I suppose it will not. I apprehend it may serve to promote very pernicious and destructive purposes. It may perhaps be insinuated to other states, and even to distant parts of this state, by people in opposition to this system, that the expediency of adopting, is at most very doubtful, and that the business labours among the members of the convention.

This would not be a true representation of the fact; for there is the greatest reason to believe, that there is a very considerable majority, who do not hesitate to ratify the constitution. We were sent here to express the voice of our constituents on the subject, and I believe that many of them expect to hear the echo of that voice before this time.

When I consider the attempts that have been made on this floor, and the many misrepresentations of what has been said among us, that have appeared in the publick papers, printed in this city, I confess that I am induced to suspect that opportunity may be taken to pervert and abuse the principles on which the friends of this constitution act. If attempts are made here, will they not be repeated when the distance is greater, and the means of information fewer? Will they not at length produce an uneasiness, for which there is, in fact, no cause? Ought we not to prohibit any such uses being made of the continuance of our deliberations? We do not wish to preclude debate—of this our conduct has furnished the most ample testimony. The members in opposition have not been prevented a repetition of all their objections, that they could urge against this plan.

The honourable gentleman from Fayette (Mr. Smilie) the other evening claimed for the minority, the merit of contending for the rights of mankind; and he told us, that it has been the practice of all ages, to treat such minorities with contempt: he further took the liberty of observing, that if the majority had the power, they do not want the inclination to consign the minority to punishment. I know that claims, self-made, form no small part of the merit, to which we have heard undisguised pretences; but it is one thing to claim, and it is another thing, very different indeed, to support that claim. The minority, Sir, are contending for the rights of mankind; what then are the majority contending for? If the minority are contending for the rights of mankind, the majority must be contending for the doctrines of tyranny and slavery. Is it probable that that is the case? Who are the majority in this assembly? Are they not the people? Are they not the representatives of the people, as well as the minority? Were they not elected by the people as well as the minority? Were they not elected by the greater part of the people? Have we a single right separate from the rights of the people? Can we forge fetters for others that will not be clasped round our own limbs? Can we make heavy chains, that shall not cramp the growth of our own posterity? On what fancied distinction shall the minority assume to themselves the merit of contending for the rights of mankind?

Sir, if the system proposed by the late convention, and the conduct of its advocates, who have appeared in this house, deserve the declarations and insinuations that have been made concerning them; well may we exclaim—Ill fated America! thy crisis was approaching! perhaps it was come! Thy various interests were neglected—thy most sacred rights were insecure. Without a government! without energy! without confidence internally! without respect externally! the advantages of society were lost to thee! In such a situation, distressed but not despairing, thou desiredst to re assume thy native vigour, and to lay the foundation of future empire! Thou selectedst a number of thy sons, to meet together for the purpose. The selected and honoured characters met; but horrid to tell! they not only consented. but they combined in an aristocratick system, calculated and intended to enslave their country! Unhappy Pennsylvania! thou, as a part of

the union, must share in its unfortunate fate! For when this system, after being laid before thy citizens, comes before the delegates selected by you for its consideration, there are found but three of the numerous members that have virtue enough to raise their voices in support of the rights of mankind! America, particularly Pennsylvania, must be ill-starred indeed, if this is a true state of the case! I trust we may address our country in far other language.

Happy America! Thy crisis was indeed alarming, but thy situation was not desperate. We had confidence in our country; though on which ever side we turned, we were presented with scenes of distress. Though the jarring interests of the various states, and the different habits and inclinations of their inhabitants, all lay in the way, and rendered our prospect gloomy, and discouraging indeed, yet such were the generous and mutual sacrifices offered up, that amidst forty two members, who represented twelve of the United States, there were only three who did not attest the instrument as a confirmation of its goodness—happy Pennsylvania! This plan has been laid before thy citizens for consideration, they have sent delegates to express their voice; and listen, with rapture listen! from only three opposition has been heard against it.

The singular unanimity that has attended the whole progress of their business, will, in the minds of those considerate men, who have not had opportunity to examine the general and particular interest of their country, prove to their satisfaction, that it is an excellent constitution, and worthy to be adopted, ordained and established by the people of the United States.

After having viewed the arguments drawn from *probability*, whether this is a good or a bad system, whether those who contend for it, or those who contend against it, contend for the rights of mankind, let us step forward and examine the *fact*.

We were told some days ago, by the honourable gentleman from Westmoreland (Mr. Findley) when speaking of this system and its objects, that the convention, no doubt, thought they were forming a compact or contract of the greatest importance. Sir, I confess I was much surprised, at so late a stage of the debate, to hear such principles maintained. It was matter of surprise to see the great leading principle of this system, still so very much

misunderstood. "The convention, no doubt, thought they were forming a contract!" I cannot answer for what every member thought; but I believe it cannot be said, that they thought they were making a contract, because I cannot discover the least trace of a compact in that system. There can be no compact unless there are more parties than one. It is a new doctrine, that one can make a compact with himself. "The convention were forming compacts!" With whom? I know no bargains that were made there. I am unable to conceive who the parties could be. The state-governments make a bargain with one another; that is the doctrine that is endeavoured to be established, by the gentlemen in opposition; their state-sovereignties wish to be represented! But far other were the ideas of the convention, and far other are those conveyed in the system itself.

As this subject has been often mentioned and as often misunderstood, it may not be improper to take some further notice of it. This, Mr. president, is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority, "*we the PEOPLE do ordain and establish,*" &c. from their ratification, and their ratification alone, it is to take its constitutional authenticity; without that, it is no more than *tabula rasa*.

I know very well all the common-place rant of state-sovereignties, and that government is founded in original compact. If that position was examined, it will be found not to accede very well with the true principle of free government. It does not suit the language or genius of the system before us. I think it does not accord with experience, so far as I have been able to obtain information from history.

The greatest part of governments have been founded on conquest; perhaps a few early ones may have had their origin in paternal authority. Sometimes a family united, and that family afterwards extended itself into a community. But the greatest governments which have appeared on the face of the globe, have been founded in conquest. The great empires of Assyria, Persia, Macedonia and Rome, were all of this kind. I know well that in Great Britain, since the revolution, it has become a principle, that the constitution is founded in contract; but the form and time of that contract, no writer has yet attempted to discover.

It was however recognised at the time of the revolution, therefore is politically true. But we should act very imprudently to consider our liberties as placed on such foundation.

If we go a little further on this subject, I think we see that the doctrine of original compact, cannot be supported consistently with the best principles of government. If we admit it, we exclude the idea of amendment; because a contract once entered into between the governour and governed, becomes obligatory, and cannot be altered but by the mutual consent of both parties. The citizens of United America, I presume do not wish to stand on that footing, with those to whom, from convenience, they please to delegate the exercise of the general powers necessary for sustaining and preserving the union. They wish a principle established, by the operation of which the legislatures may feel the direct authority of the people. The people possessing that authority, will continue to exercise it by amending and improving their own work. This constitution may be found to have defects in it; amendments hence may become necessary; but the idea of a government founded on contract, destroys the means of improvement. We hear it every time the gentlemen are up, "shall we violate the confederation, which directs every alteration that is thought necessary to be established by the state-legislatures only." Sir, those gentlemen must ascend to a higher source; the people fetter themselves by no contract. If your state-legislatures have cramped themselves by compact, it was done without the authority of the people, who alone possess the supreme power.

I have already shown, that this system is not a compact or contract; the system itself tells you what it is; it is an ordinance and establishment of the people. I think that the force of the introduction to the work, must by this time have been felt. It is not an unmeaning flourish. The expressions declare, in a practical manner, the principle of this constitution. - It is ordained and established by the people themselves; and we, who give our votes for it, are merely the proxies of our constituents. We sign it as their attornies, and as to ourselves, we agree to it as individuals.

We are told by honourable gentlemen in opposition, "that the present confederation should have been continued, but that

additional powers should have been given to it: that such was the business of the late convention, and that they had assumed to themselves, the power of proposing another in its stead; and that which is proposed, is such a one as was not expected by the legislatures nor by the people. I apprehend this would have been a very insecure, very inadequate, and a very pernicious mode of proceeding. Under the present confederation, Congress certainly do not possess sufficient power; but one body of men we know they are; and were they invested with additional powers, they must become dangerous. Did not the honourable gentleman himself tell us, that the powers of government, vested either in one man, or one body of men, formed the very description of tyranny? To have placed in the President, the legislative, the executive and judicial authority, all of which are essential to the general government, would indubitably have produced the severest despotism. From this short deduction, one of these two things must have appeared to the convention, and must appear to every man, who is at the pains of thinking on the subject. It was indispensably necessary, either to make a new distribution of the powers of government, or to give such powers to one body of men, as would constitute a tyranny. If it was proper to avoid tyranny, it becomes requisite to avoid placing additional powers in the hands of a Congress, constituted like the present; hence the conclusion is warranted, that a different organization ought to take place.

Our next inquiry ought to be, whether this is the most proper disposition and organization of the necessary powers. But before I consider this subject, I think it proper to notice one sentiment, expressed by an honourable gentleman from the county of Cumberland (Mr. Whitehill;) he asserts the extent of the government is too great, and this system cannot be executed. What is the consequence if this assertion is true? It strikes directly at the root of the union.

I admit, Mr. president, there are great difficulties in adopting a system of good and free governments to the extent of our country. But, I am sure, that our interests as citizens, as states, and as a nation, depend essentially upon an union. This constitution is proposed to accomplish that great and desirable end. Let the

experiment be made ; let the system be fairly and candidly tried, before it is determined that it cannot be executed.

I proceed to another objection ; for I mean to answer those that have been suggested, since I had the honour of addressing you last week. It has been alleged by the honourable gentlemen, that this general government possesses powers, for *internal* purposes, and that the general government cannot exercise internal powers. The honourable member from Westmoreland (Mr. Findley) dilates on this subject, and instances the opposition that was made by the colonies against Great Britain, to prevent her imposing internal taxes or excises. And before the federal government will be able to impose the one, or obtain the other, he considers it necessary that it should possess power for every internal purpose.

Let us examine these objections ; if this government does not possess internal as well as external power, and that power for internal as well as external purposes, I apprehend, that all that has hitherto been done, must go for nothing. I apprehend a government that cannot answer the purposes for which it is intended, is not a government for this country. I know that Congress, under the present articles of confederation, possess no internal power, and we see the consequences ; they can recommend ; they can go further, they can make requisitions, but there they must stop. For as far as I recollect, after making a law, they cannot take a single step towards carrying it into execution. I believe it will be found in experience, that with regard to the exercise of internal powers, the general government will not be unnecessarily rigorous. The future collection of the duties and imposts, will, in the opinion of some, supersede the necessity of having recourse to internal taxation. The United States will not, perhaps, be often under the necessity of using this power at all ; but if they should, it will be exercised only in a moderate degree. The good sense of the citizens of the United States, is not to be alarmed by the picture of taxes collected at the point of the bayonet. There is no more reason to suppose, that the delegates and representatives in Congress, any more than the legislature of Pennsylvania, or any other state, will act in this manner. Insinuations of this kind, made against one body of men, and not against another, though both the representatives of the people,

are not made with propriety, nor will they have the weight of argument. I apprehend the greatest part of the revenue will arise from external taxation. But certainly it would have been very unwise in the late convention to have omitted the addition of the other powers; and I think it would be very unwise in this convention, to refuse to adopt this constitution, because it grants Congress power to lay and collect taxes, for the purpose of providing for the common defence and general welfare of the United States.

What is to be done to effect these great purposes, if an impost should be found insufficient? Suppose a war was suddenly declared against us by any foreign power, possessed of a formidable navy, our navigation would be laid prostrate, our imposts must cease; and shall our existence as a nation, depend upon the peaceful navigation of our seas? A strong exertion of maritime power, on the part of an enemy, might deprive us of these sources of revenue in a few months. It may suit honourable gentlemen, who live at the western extremity of this state, that they should contribute nothing, by internal taxes, to the support of the general government. They care not what restraints are laid upon our commerce; for what is the commerce of Philadelphia to the inhabitants on the other side the Alleghany mountain? But though it may suit them, it does not suit those in the lower part of the state, who are by far the most numerous. Nor can we agree that our safety should depend altogether upon a revenue arising from commerce.

Excise may be a necessary mode of taxation; it takes place in most states already.

The capitation-tax is mentioned as one of those that are exceptionable. In some states, that mode of taxation is used; but I believe in many, it would be received with great reluctance; there are one or two states, where it is constantly in use, and without any difficulties and inconveniences arising from it. An excise, in its very principles, is an improper tax, if it could be avoided; but yet it has been a source of revenue in Pennsylvania, both before the revolution and since; during all which time, we have enjoyed the benefit of free government.

I presume, Sir, that the executive powers of government ought to be commensurate with the government itself, and that

a government which cannot act in every part, is so far defective. Consequently it is necessary that Congress possess powers to tax internally as well as externally.

It is objected to this system, that under it there is no sovereignty left in the state-governments. I have had occasion to reply to this already; but I should be very glad to know at what period the state-governments became possessed of the supreme power. On the principle on which I found my arguments, and that is the principle of this constitution, the supreme power resides in the people. If they choose to indulge a part of their sovereign power to be exercised by the state-governments, they may. If they have done it, the states were right in exercising it; but if they think it no longer safe or convenient, they will resume it, or make a new distribution, more likely to be productive of that good, which ought to be our constant aim.

The power both of the general government, and the state-governments, under this system, are acknowledged to be so many emanations of power from the people. The great object now to be attended to, instead of disagreeing about who shall possess the supreme power, is to consider whether the present arrangement is well calculated to promote and secure the tranquillity and happiness of our common country. These are the dictates of sound and unsophisticated sense, and what ought to employ the attention and judgment of this honourable body.

We are next told, by the honourable gentlemen in opposition (as indeed we have been from the beginning of the debates in this convention, to the conclusion of their speeches yesterday) that this is a consolidated government, and will abolish the state-governments. Definitions of a consolidated government have been called for; the gentlemen gave us what they termed definition, but it does not seem, to me at least, that they have as yet expressed clear ideas upon that subject. I will endeavour to state their different ideas upon this point. The gentleman from Westmoreland (Mr. Findley) when speaking on this subject, says, that he means by a consolidation, that government which puts the thirteen states into one.

The honourable gentleman from Fayette (Mr. Smilie) gives you this definition: "What I mean by a consolidated government

is one that will transfer the sovereignty from the state-governments, to the general government.

The honourable member from Cumberland (Mr. Whitehill) instead of giving you a definition, Sir, tells you again, that "it is a consolidated government, and we have proved it so."

These, I think, Sir, are the different descriptions given us of a consolidated government. As to the first, that it is a consolidated government, that puts the thirteen United States into one; if it is meant, that the general government will destroy the governments of the states, I will admit that such a government would not suit the people of America. It would be improper for *this* country, because it could not be proportioned to *its extent* on the principles of freedom. But that description does not apply to the system before you. This, instead of placing the state-governments in jeopardy, is founded on their existence. On this principle, its organization depends; it must stand or fall, as the state governments are secured or ruined. Therefore, though this may be a very proper description of a consolidating government, yet it must be disregarded as inapplicable to the proposed constitution. It is not treated with decency, when such insinuations are offered against it.

The honourable gentleman (Mr. Smilie) tells you, that a consolidating government, "is one that will transfer the sovereignty from the state-governments to the general government." Under this system, the sovereignty is not in the possession of the state-governments, therefore it cannot be transferred from them to the general government. So that in no point of view of this definition, can we discover that it applies to the present system.

In the exercise of its powers will be insured the exercise of their powers to the state-government; it will insure peace and stability to them; their strength will increase with its strength, their growth will extend with its growth.

Indeed narrow minds, and some such there are in every government—narrow minds, and intriguing spirits, will be active in sowing dissensions and promoting discord between them. But those whose understandings, and whose hearts are good enough to pursue the general welfare, will find, that what is the interest of the whole, must, on the great scale, be the interest of every

part. It will be the duty of a state, as of an individual, to sacrifice her own convenience to the general good of the union.

The next objection that I mean to take notice of is, that the powers of the several parts of this government are not kept as distinct and independent as they ought to be. I admit the truth of this general sentiment. I do not think, that in the powers of the Senate, the distinction is marked with so much accuracy as I wished, and still wish ; but yet I am of opinion, that real and effectual security is obtained, which is saying a great deal. I do not consider this part as wholly unexceptionable ; but even where there are defects in this system, they are improvements upon the old. I will go a little further ; though in this system, the distinction and independence of power is not adhered to with entire theoretical precision, yet it is more strictly adhered to than in any other system of government in the world. In the constitution of Pennsylvania, the executive department exercises judicial powers in the trial of publick officers ; yet a similar power in this system is complained of ; at the same time the constitution of Pennsylvania is referred to, as an example for the late convention, to have taken a lesson by.

In New Jersey, in Georgia, in South Carolina, and in North Carolina, the executive power is blended with the legislative.— Turn to their constitutions, and see in how many instances.

In North Carolina, the Senate and House of Commons, elect the governour himself ; they likewise elect seven persons, to be a council of state, to advise the governour in the execution of his office. Here we find the whole executive department under the nomination of the legislature, at least the most important part of it.

In South Carolina, the legislature appoint the governour and commander in chief, lieutenant-governour and privy council.— “Justices of the peace shall be nominated by the legislature, and commissioned by the governour,” and what is more, they are appointed during pleasure. All other judicial officers are to be appointed by the Senate and House of Representatives. I might go further and detail a great multitude of instances, in which the legislative, executive and judicial powers are blended, but it is unnecessary ; I only mention these to show, that though this constitution does not arrive at what is called perfection, yet, it con-

tains great improvements, and its powers are distributed with a degree of accuracy, superior to what is termed accuracy, in particular states.

There are four instances in which improper powers are said to be blended in the Senate. We are told, that this government is imperfect, because the Senate possess the power of trying impeachments. But here, Sir, the Senate are under a check, as no impeachment can be tried until it is made; and the House of Representatives possess the sole power of making impeachments. We are told that the share which the Senate have in making treaties, is exceptionable; but here they are also under a check, by a constituent part of the government, and nearly the immediate representative of the people; I mean the President of the United States. They can make no treaty without his concurrence. The same observation applies in the appointment of officers. Every officer must be nominated solely and exclusively by the President.

Much has been said on the subject of treaties, and this power is denominated a blending of the legislative and executive powers of the Senate. It is but justice to represent the favourable, as well as unfavourable side of a question, and from thence determine, whether the objectionable parts are of a sufficient weight to induce a rejection of this constitution.

There is no doubt, sir, but under this constitution, treaties will become the supreme law of the land; nor is there any doubt but the Senate and President possess the power of making them. But though treaties are to have the force of laws, they are in some important respects very different from other acts of legislation. In making laws, our own consent alone is necessary. In forming treaties, the concurrence of another power becomes necessary; treaties, Sir, are truly contracts, or compacts, between the different states, nations or princes, who find it convenient or necessary to enter into them. Some gentlemen are of opinion, that the power of making treaties should have been placed in the legislature at large; there are, however, reasons that operate with a great force on the other side. Treaties are frequently, (especially in time of war,) of such a nature, that it would be extremely improper to publish them, or even commit the secret of their negotiation to any great number of persons. For my part

I am not an advocate for secrecy in transactions relating to the publick ; not generally even in forming treaties, because I think that the history of the diplomattick corps will evince, even in that great department of politicks, the truth of an old adage, that "honesty is the best policy," and this is the conduct of the most able negociators ; yet sometimes secrecy may be necessary, and therefore it becomes an argument against committing the knowledge of these transactions to too many persons. But in their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make ; they will be made between us and the powers at the distance of three thousand miles. A long series of negotiation will frequently precede them ; and can it be the opinion of these gentlemen, that the legislature should be in session during this whole time ? It well deserves to be remarked, that though the House of Representatives possess no active part in making treaties, yet their legislative authority will be found to have strong restraining influence upon both President and Senate. In England, if the King and his ministers find themselves, during their negotiation, to be embarrassed, because an existing law is not repealed, or a new law is not enacted, they give notice to the legislature of their situation, and inform them it will be necessary, before the treaty can operate, that some law be repealed, or some be made. And will not the same thing take place here ? Shall less prudence, less caution, less moderation, take place among those who negotiate treaties for the United States, than among those who negotiate them for the other nations of the earth ? And let it be attended to, that even in the making treaties the states are immediately represented, and the people mediately represented ; two of the constituent parts of government must concur in making them. Neither the President nor the Senate solely, can complete a treaty ; they are checks upon each other, and are so balanced, as to produce security to the people.

I might suggest other reasons, to add weight to what has already been offered, but I believe it is not necessary ; yet let me however add one thing, the Senate is a favourite with many of the states, and it was with difficulty that these checks could be procured ; it was one of the last exertions of conciliation, in the late convention that obtained them.

It has been alleged, as a consequence of the small number of representatives, that they will not know as intimately as they ought, the interests, inclinations, or habits, of their constituents.

We find, on examination of all its parts, that the objects of this government are such, as extend beyond the bounds of the particular states. This is the line of distinction between this government and the particular state-governments.

This principle I had an opportunity of illustrating on a former occasion. Now, when we come to consider the objects of this government, we shall find, that in making our choice of a proper character, to be a member of the House of Representatives, we ought to fix on one, whose mind and heart are enlarged; who possesses a general knowledge of the interests of America, and a disposition to make use of that knowledge, for the advantage and welfare of his country. It belongs not to this government to make an act for a particular township, county, or state.

A defect in *minute* information, has not certainly been an objection in the management of the business of the United States; but the want of enlarged ideas, has hitherto been chargeable on our councils; yet, even with regard to minute knowledge, I do not conceive it impossible to find eight characters, that may be very well informed as to the situation, interests and views, of every part of this state; and who may have a concomitant interest with their fellow-citizens: they could not materially injure others without affecting their own fortunes.

I did say, that in order to obtain that enlarged information in our representatives, a large district for election would be more proper than a small one. When I speak of large districts, it is not agreeable to the idea entertained by the honourable member from Fayette, (Mr. Smilie) who tells you, that elections for large districts must be ill-attended, because the people will not choose to go very far on this business. It is not meant, sir, by me, that the votes should be taken at one place; no, Sir, the elections may be held through this state, in the same manner as elections for members of the general assembly, and this may be done without any additional inconvenience or expense.

If it could be effected, all the people of the same society ought to meet in one place, and communicate freely with each other on the great business of representation. Though this cannot be

done in fact, yet we find that it is the most favourite and constitutional idea. It is supported by this principle too, that every member is the representative of the whole community, and not of a particular part. The larger therefore the district is, the greater is the probability of selecting wise and virtuous characters, and the more agreeable it is to the constitutional principle of representation.

As to the objection, that the House of Representatives may be bribed by the Senate, I confess I do not see that bribery is an objection against *this system*; it is rather an objection against human nature. I am afraid that bribes in every government may be offered and received; but let me ask of the gentlemen who urge this objection, to point out where any power is given to bribe *under this constitution*? Every species of influence is guarded against as much as possible. Can the Senate procure money to effect such design? All publick monies must be disposed of by law, and it is necessary that the House of Representatives originate such law. Before the money can be got out of the treasury, it must be appropriated by law. If the legislature had the effrontery to set aside three or four hundred thousand pounds for this purpose, and the people would tamely suffer it, I grant it might be done; and in Pennsylvania the legislature might do the same; for by a law, and that conformably to the constitution, they might divide among themselves what portion of the publick money they pleased. I shall just remark, Sir, that the objections, which have repeatedly been made, with regard to "the number of representatives being too small, and that they may possibly be made smaller: that the districts are too large, and not within the reach of the people; and that the House of Representatives may be bribed by the Senate." These objections come with an uncommon degree of impropriety, from those who would refer us back to the articles of confederation. For under those, the representation of this state cannot exceed seven members, and may consist of only two; and these are wholly without the reach or control of the people. Is there not also greater danger that the majority of such a body might be more easily bribed, than the majority of one, not only more numerous, but checked by a division of two or three distinct and independent parts? The

danger is certainly better guarded against in the proposed system, than in any other yet devised.

The next objections which I shall notice, are, "that the powers of the Senate are too great, that the representation therein is unequal, and that the Senate, from the smallness of its number, may be bribed." Is there any propriety in referring us to the confederation on this subject? Because, in one or two instances, the Senate possess more power than the House of Representatives, are these gentlemen supported in their remarks, when they tell you they wished and expected more powers to be given to the present Congress, a body certainly much more exceptionable than any instituted under this system?

"That the representation in the Senate is unequal," I regret, because I am of opinion, the states ought to be represented according to their importance; but in this system there is considerable improvement; for the true principle of representation is carried into the House of Representatives, and into the choice of the President; and without the assistance of one or the other of these, the Senate is inactive, and can do neither good nor evil.

It is repeated again and again, by the honourable gentlemen, "that the power over elections, which is given to the general government in this system, is a dangerous power" I must own I feel myself surprised that an objection of this kind should be persisted in, after what has been said by my honourable colleague in reply. I think it has appeared by a minute investigation of the subject, that it would have been not only unwise, but highly improper in the late convention, to have omitted this clause, or given less power, than it does over elections. Such powers, Sir, are enjoyed by every state-government in the United States. In some, they are of a much greater magnitude; and why should this be the only one deprived of them? Ought not these, as well as every other legislative body, to have the power of judging of the qualifications of its own members? "The times, places and manner of holding elections for representatives, may be altered by Congress." This power, Sir, has been shown to be necessary, not only on some particular occasions, but even to the very existence of the federal government. I have heard some very improbable suspicions indeed, suggested with regard to the manner

in which it will be exercised. Let us suppose it may be improperly exercised; is it not more likely so to be by the particular states, than by the government of the United States? Because the general government will be more studious of the good of the whole, than a particular state will be; and therefore, when the power of regulating the time, place or manner of holding elections, is exercised by the Congress, it will be to correct the improper regulations of a particular state.

I now proceed to the second article of this constitution, which relates to the executive department.

I find, Sir, from an attention to the arguments used by the gentlemen on the other side of the house, that there are but few exceptions taken to this part of the system. I shall take notice of them, and afterwards point out some valuable qualifications, which I think this part possess in an eminent degree.

The objection against the powers of the President, is not that they are too many or too great, but to state it in the gentlemen's own language, they are so trifling, that the President is no more than the *tool* of the Senate.

Now, Sir, I do not apprehend this to be the case, because I see that he may do a great many things, independent of the Senate; and with respect to the executive powers of government in which the Senate participate, they can do nothing without him. Now I would ask, which is most likely to be the tool of the other? Clearly, Sir, he holds the helm, and the vessel can proceed neither in one direction nor another, without his concurrence. It was expected by many, that the cry would have been against the powers of the President as a monarchical power; indeed the echo of such sound was heard, some time before the rise of the late convention. There were men at that time, determined to make an attack upon whatever system should be proposed, but they mistook the point of direction. Had the President possessed those powers, which the opposition on this floor are willing to consign him, of making treaties, and appointing officers, with the advice of a council of state, the clamour would have been, that the House of Representatives, and the Senate, were the *tools* of the monarch. This, Sir, is but conjecture, but I leave it to those who are acquainted with the cur-

rent of the politicks pursued by the enemies to this system, to determine whether it is a reasonable conjecture or not.

The manner of appointing the President of the United States, I find is not objected to, therefore I shall say little on that point. But I think it well worth while, to state to this house, how little the difficulties, even in the most difficult part of this system, appear to have been noticed by the honourable gentlemen in opposition. The convention, Sir, were perplexed with no part of this plan, so much as with the mode of choosing the President of the United States. For my own part, I think the most unexceptionable mode, next after the one prescribed in this constitution, would be that practised by the eastern states, and the state of New York; yet if gentlemen object, that an eighth part of our country forms a district too large for elections, how much more would they object, if it was extended to the whole union? On this subject, it was the opinion of a great majority in convention, that the thing was impracticable; other embarrassments presented themselves.

Was the President to be appointed by the legislature? Was he to continue a certain time in office, and afterward was he to become inelegible?

To have the executive officers dependent upon the legislative, would certainly be a violation of that principle, so necessary to preserve the freedom of republics, that the legislative and executive powers should be separate and independent. Would it have been proper, that he should be appointed by the Senate? I apprehend, that still stronger objections could be urged against that—cabal—intrigue, corruption—every thing bad would have been the necessary concomitant of every election.

To avoid the inconveniences already enumerated, and many others that might be suggested, the mode before us was adopted. By it we avoid corruption, and we are little exposed to the lesser evils of party and intrigue; and when the government shall be organized, proper care will undoubtedly be taken to counteract influence even of that nature—the constitution, with the same view has directed, that the day on which the electors shall give their votes, shall be the same throughout the United States. I flatter myself the experiment will be a happy one for our country.

The choice of this officer is brought as nearly home to the people as is practicable ; with the approbation of the state-legislatures, the people may elect with only one remove ; for " each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives, to which the state may be entitled in Congress." Under this regulation, it will not be easy to corrupt the electors, and there will be little time or opportunity for tumult or intrigue. This, Sir, will not be like the elections of a Polish diet, begun in noise and ending in bloodshed.

If gentlemen will look into this article, and read for themselves, they will find, that there is no well grounded reason to suspect the President will be the *tool* of the Senate. " The President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States. He may require the opinion in writing of the principal officers in each of the executive departments, upon any subject relative to the duties of their respective offices ; and he shall have power to grant reprieves and pardons, for offences against the United States." Must the President, after all, be called the *tool* of the Senate ? I do not mean to insinuate, that he has more powers than he ought to have, but merely to declare, that they are of such a nature, as to place him above expressions of contempt.

There is another power of no small magnitude, entrusted to this officer : " he shall take care, that the laws be faithfully executed."

I apprehend, that in the administration of this government, it will not be found necessary for the Senate always to sit. I know some gentlemen have insinuated and conjectured, that this will be the case, but I am inclined to a contrary opinion. If they had employment every day, no doubt but it might be the wish of the Senate, to continue their session ; but from the nature of their business, I do not think it will be necessary for them to attend longer than the House of Representatives. Besides their legislative powers, they possess three others, viz. trying impeachments—concurring in making treaties, and in appointing officers. With regard to their power in making treaties, it is of importance, that it should be very seldom exercised—we are happily

removed from the vortex of European politicks, and the fewer, and the more simple our negotiations with European powers, the better they will be ; if such be the case, it will be but once in a number of years, that a single treaty will come before the Senate I think, therefore, that on this account it will be unnecessary to sit constantly. With regard to the trial of impeachments, I hope it is what will seldom happen. In this observation, the experience of the ten last years support me. Now there is only left the power of concurring in the appointment of officers ;—but care is taken, in this constitution, that this branch of business may be done without their presence—the President is authorised to fill up all vacancies, that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session. So that on the whole the Senate need not sit longer than the House of Representatives, at the public expense ; and no doubt if apprehensions are entertained of the Senate, the House of Representatives will not provide pay for them, one day longer than is necessary. But what, it will be asked, is this great power of the President ? He can fill the offices only by temporary appointments. True ; but every person knows the advantage of being once introduced into an office ; it is often of more importance than the highest recommendation.

Having now done with the legislative and executive branches of this government, I shall just remark, that upon the whole of the executive, it appears that the gentlemen in opposition state nothing as exceptionable, but the deficiency of powers in the President ; but rather seem to allow some degree of political merit in this department of government.

I now proceed to the judicial department ; and here, Mr. president, I meet an objection, I confess I had not expected ; and it seems it did not occur to the honourable gentleman (Mr. Findley) who made it, until a few days ago.

He alleges, that the judges, under this constitution, are not rendered sufficiently independent, because they may hold other offices ; and though they may be independent as judges, yet their other office may depend upon the legislature. I confess, Sir, this objection appears to me, to be a little wire-drawn in the first place ; the legislature can appoint to no office, therefore the de-

pendence could not be on them for the office, but rather on the President and Senate ; but then these cannot add the salary, because no money can be appropriated, but in consequence of a law of the United States. No sinecure can be bestowed on any judge, but by the concurrence of the whole legislature and of the President ; and I do not think this an event that will probably happen.

It is true, that there is a provision made in the constitution of Pennsylvania, that the judges shall not be allowed to hold any other office whatsoever ; and I believe they are expressly forbidden to sit in Congress ; but this, Sir, is not introduced as a principle into this constitution. There are many states in the union, whose constitutions do not limit the usefulness of their best men, or exclude them from rendering such services to their country, for which they are found eminently qualified. New York, far from restricting their chancellor, or judges of the Supreme Court, from a seat in Congress, expressly provide for sending them there on extraordinary occasions. In Connecticut, the judges are not precluded from enjoying other offices. Judges from many states have sat in Congress. Now it is not to be expected, that eleven or twelve states are to change their sentiments and practice on this subject, to accommodate themselves to Pennsylvania.

It is again alleged against this system, that the powers of the judges are too extensive ; but I will not trouble you, Sir, with a repetition of what I had the honour of delivering the other day ; I hope the result of those arguments gave satisfaction, and proved that the judicial were commensurate with the legislative powers ; that they went no further, and that they ought to go so far.

The laws of Congress being made for the union, no particular state can be alone affected, and as they are to provide for the general purposes of the union, so ought they to have the means of making the provisions effectual, over all that country included within the union.

Eodem Die, 1787, P. M.

MR. WILSON.—I shall now proceed, Mr. president, to notice the remainder of the objections that have been suggested, by

the honourable gentlemen who oppose the system now before you.

We have been told, Sir, by the honourable member from Fayette (Mr. Smilie) "that the trial by jury was *intended* to be given up, and the civil law was *intended* to be introduced into its place, in civil cases."

Before a sentiment of this kind was hazarded, I think, Sir, the gentleman ought to be prepared with better proof in its support, than any he has yet attempted to produce. It is a charge, Sir, not only unwarrantable, but cruel; the idea of such a thing, I believe, never entered into the mind of a single member of that convention; and I believe further, that they never suspected there would be found within the United States, a single person that was capable of making such a charge. If it should be well founded, Sir, they *must* abide by the consequences, but if, as I trust it will fully appear, it is ill founded, then he or they who make it *ought* to abide by the consequences.

Trial by jury forms a large field for investigation, and numerous volumes are written on the subject; those who are well acquainted with it may employ much time in its discussion; but in a country where its excellence is so well understood, it may not be necessary to be very prolix in pointing them out. For my part, I shall confine myself to a few observations in reply to the objections that have been suggested.

The member from Fayette (Mr. Smilie) has laboured to infer, that under the articles of confederation, the Congress possessed no appellate jurisdiction; but this being decided against him, by the words of that instrument, by which is granted to Congress the power of "establishing courts for receiving and determining, finally, appeals in all cases of capture;" he next attempts a distinction, and allows the power of appealing from the decisions of the judges, but not from the verdict of a jury; but this is determined against him also, by the practice of the states; for in every instance which has occurred, this power has been claimed by Congress, and exercised by the Court of Appeals; but what would be the consequence of allowing the doctrine for which he contends? Would it not be in the power of a jury, by their verdict, to involve the whole union in a war? They may condemn the property of a neutral, or otherwise infringe

the law of nations; in this case ought their verdict to be without revision? Nothing can be inferred from this, to prove that trials by jury were intended to be given up. In Massachusetts, and all the eastern states, their causes are tried by juries, though they acknowledge the appellate jurisdiction of Congress.

I think I am not now to learn the advantages of a trial by jury; it has excellencies that entitle it to a superiority over any other mode, in cases to which it is applicable.

Where jurors can be acquainted with the characters of the parties, and the witnesses, where the whole cause can be brought within their knowledge and their view, I know no mode of investigation equal to that by a jury; they hear every thing that is alleged; they not only hear the words, but they see and mark the features of the countenance; they can judge of the weight due to such testimony; and moreover, it is a cheap and expeditious manner of distributing justice. There is another advantage annexed to the trial by jury; the jurors may indeed return a mistaken or ill-founded verdict, but their errors cannot be systematical.

Let us apply these observations to the objects of the judicial department, under this constitution. I think it has been shown already, that they all extend beyond the bounds of any particular state; but further, a great number of the civil causes there enumerated, depend either upon the law of nations, or the marine law, that is, the general law of mercantile countries. Now, Sir, in such causes, I presume it will not be pretended that this mode of decision ought to be adopted; for the law with regard to them is the same here as in every other country, and ought to be administered in the same manner. There are instances, in which I think it highly probable, that the trial by jury will be found proper; and if it is highly probable that it will be found proper, is it not equally probable, that it will be adopted? There may be causes depending between citizens of different states, and as trial by jury is known and regarded in all the states, they will certainly prefer that mode of trial before any other. The Congress will have the power of making proper regulations on this subject, but it was impossible for the convention to have gone minutely into it; but if they could, it must have been very improper, because alterations, as I observed before, might have

been necessary; and whatever the convention might have done would have continued unaltered, unless by an alteration of the constitution. Besides; there was another difficulty with regard to this subject. In some of the states they have Courts of Chancery, and other appellate jurisdictions, and those states are as attached to that mode of distributing justice, as those that have none are to theirs.

I have desired, repeatedly, that honourable gentlemen, who find fault, would be good enough to point out what they deem to be an improvement. The member from Westmoreland (Mr. Findley) tells us, that the trial between citizens of different states, ought to be by a jury of that state in which the cause of action arose. Now it is easy to see, that in many instances, this would be very improper and very partial; for beside the different manner of collecting and forming juries in the several states, the plaintiff comes from another state; he comes a stranger, unknown as to his character or mode of life, while the other party is in the midst of his friends, or perhaps his dependants. Would a trial by jury in such a case ensure justice to the stranger? But again; I would ask that gentleman, whether, if a great part of his fortune was in the hands of some person in Rhode Island, he would wish, that his action to recover it, should be determined by a jury of that country, under its present circumstances?

The gentleman from Fayette (Mr. Smilie) says, that if the convention found themselves embarrassed, at least they might have done thus much, they should have declared, that the substance should be secured by Congress; this would be saying nothing unless the cases were particularized.

MR. SMILIE.—I said the convention ought to have declared, that the legislature should establish the trial by jury by proper regulations.

MR. WILSON.—The legislature shall establish it by proper regulations! So after all, the gentleman has landed us at the very point from which we set out. He wishes them to do the very thing they have done, to leave it to the discretion of Congress. The fact, Sir, is, nothing more could be done.

It is well known, that there are some cases that should not come before juries; there are others, that in some of the states, never come before juries, and in these states where they do come before them, appeals are found necessary, the facts re-examined, and the verdict of the jury sometimes set aside; but I think in all cases, where the cause has come originally before a jury, that the last examination ought to be before a jury likewise.

The power of having appellate jurisdiction, as to facts, has been insisted upon as a proof, "that the convention intended to give up the trial by jury in civil cases, and to introduce the civil law." I have already declared my own opinion on this point, and have shown, not merely, that it is founded on reason and authority. The express declaration of Congress* is to the same purpose: they insist upon this power, as requisite to preserve the peace of the union; certainly, therefore, it ought always to be possessed by the head of the confederacy.

We are told, as an additional proof, that the trial by jury was intended to be given up, "that appeals are unknown to the common law; that the term is a civil law term, and with it the civil law is intended to be introduced." I confess I was a good deal surprised at this observation being made; for Blackstone, in the very volume which the honourable member (Mr. Smilie) had in his hand, and read us several extracts from, has a chapter entitled "of proceeding in the nature of appeals:" and in that chapter says, that the principal method of redress for erroneous judgments, in the King's Courts of Record, is by writ of error to some superior "*Court of Appeal*."† Now, it is well known, that his book is a commentary upon the common law. Here then is a strong refutation of the assertion, "that appeals are unknown to the common law."

I think these were all the circumstances adduced to show the truth of the assertion, that in this constitution, the trial by jury was intended to be given up by the late convention in framing it. Has the assertion been proved? I say not, and the allegations offered, if they apply at all, apply in a contrary direction. I am glad that this objection has been stated, because it is a subject upon which the enemies of this constitution have much in-

* Journal of Congress, March 6, 1770.

† III. Blackstone, 406.

sisted. We have now had an opportunity of investigating it fully, and the result is, that there is no foundation for the charge, but it must proceed from ignorance, or something worse.

I go on to another objection, which has been taken to this system, "that the expense of the general government and of the state governments, will be too great, and that the citizens will not be able to support them." If the state governments are to continue as cumbersome and expensive as they have hitherto been, I confess it would be distressing to add to their expenses, and yet it might be necessary; but I think I can draw a different conclusion on this subject, from more conjectures than one. The additional revenue to be raised by a general government, will be more than sufficient for the additional expense: and a great part of that revenue may be so contrived, as not to be taken from the citizens of this country: for I am not of opinion, that the consumer always pays the impost that is laid on imported articles; it is paid sometimes by the importer, and sometimes by the foreign merchant who sends them to us. Had a duty of this nature been laid at the time of the peace, the greatest part of it would have been the contribution of foreigners. Besides, whatever is paid by the citizens, is a voluntary *payment*,

I think, Sir, it would be very easy and laudable, to lessen the expenses of the state governments. I have been told, (and perhaps it is not very far from the truth) that there are *two thousand* members of assembly in the several states; the business of revenue is done in consequence of requisitions from Congress, and whether it is furnished or not, it commonly becomes a subject of discussion. Now when this business is executed by the legislature of the United States, I leave it to those who are acquainted with the expense of long and frequent sessions of assembly, to determine the great saving that will take place. Let me appeal to the citizens of Pennsylvania, how much time is taken up in this state every year, if not every session, in providing for the payment of an amazing interest due on her funded debt. There will be many sources of revenue, and many opportunities for economy, when the business of finance shall be administered under one government; the funds will be more pro-

ductive, and the taxes, in all probability, less burthensome than they are now.

I proceed to another objection, that is taken against the power given to Congress, of raising and keeping up standing armies. I confess I have been surprised that this objection was ever made, but I am more so that it is still repeated and insisted upon. I have taken some pains to inform myself how the other governments of the world stand with regard to this power; and the result of my inquiry is, that there is not one which has not the power of raising and keeping up standing armies. A government without the power of defence! It is a solecism.

I well recollect the principle insisted upon by the patriotick body in Great Britain; it is, that in time of peace, a standing army ought not to be kept up, without the consent of Parliament. Their only apprehension appears to be, that it might be dangerous, was the army kept up without the concurrence of the representatives of the people. Sir, we are not in the millenium. Wars may happen—and when they do happen, who is to have the power of collecting and appointing the force then become immediately and indispensably necessary?

It is not declared in this constitution, that the Congress *shall* raise and support armies. No, Sir, if they are not driven to it by necessity, why should we suppose they would do it by choice, any more than the representatives of the same citizens, in the state legislatures? For we must not lose sight of the great principle upon which this work is founded. The authority here given to the general government, flows from the same source, as that placed in the legislatures of the several states.

It may be frequently necessary to keep up standing armies in time of peace. The present Congress have experienced the necessity; and seven hundred troops are just as much a standing army as seventy thousand. The principle which sustains them is precisely the same. They may go further, and raise an army, without communicating to the publick the purpose for which it is raised. On a particular occasion, they did this—When the commotions existed in Massachusetts, they gave orders for enlisting an additional body of two thousand men. I believe it is not generally known, on what a perilous tenure we held our freedom and independence at that period. The flames of internal insur-

reaction were ready to burst out in every quarter ; they were formed by the correspondents of some state-officers (to whom an allusion was made on a former day) and from one end to the other of the continent, we walked on ashes, concealing fire beneath our feet ; and ought Congress to be deprived of power to prepare for the defence and safety of our country ? Ought they to be restrained from arming, until they divulge the motive which induced them to arm ? I believe the *power* of raising and keeping up an army, in time of peace, is essential to every government. No government can secure its citizens against dangers, internal and external, without possessing it, and sometimes carrying it into execution. I confess it is a power, in the exercise of which all wise and moderate governments will be as prudent and forbearing as possible. When we consider the situation of the United States, we must be satisfied, that it will be necessary to keep up some troops for the protection of the western frontiers, and to secure our interest in the internal navigation of that country. It will be not only necessary, but it will be economical on the great scale. Our enemies finding us invulnerable, will not attack us, and we shall thus prevent the occasion for larger standing armies. I am now led to consider another charge that is brought against this system.

It is said, that Congress should not possess the power of calling out the militia, to execute the laws of the union, suppress insurrections and repel invasions, nor the President have the command of them, when called out for such purposes.

I believe any gentleman who possess military experience will inform you, that men without a uniformity of arms, accoutrements and discipline, are no more than a mob in a camp ; that in the field, instead of assisting, they interfere with one another. If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States.

I really expected that for this part of the system at least, the framers of it would have received plaudits, instead of censures, as they here discover a strong anxiety to have this body put upon an effective footing, and thereby, in a great measure,

to supersede the necessity of raising, or keeping up, standing armies.

The militia formed under this system, and trained by the several states, will be such a bulwark of internal strength, as to prevent the attacks of foreign enemies. I have been told, that about the year 1744, an attack was intended by France upon Massachusetts Bay, but was given up on reading the militia law of that province.

If a single state could deter an enemy from such attempts, what influence will the proposed arrangement have upon the different powers of Europe?

In every point of view, this regulation is calculated to produce the best effects. How powerful and respectable must the body of militia appear, under general and uniform regulations! How disjointed, weak and inefficient are they at present! I appeal to military experience for the truth of my observations.

The next objection, Sir, is a serious one indeed; it was made by the honourable gentleman from Fayette (Mr. Smilie) "the convention knew this was not a free government, otherwise they would not have asked the powers of the purse and sword." I would beg to ask the gentleman, what free government he knows that has not the powers of both? There was indeed a government under which we unfortunately were for a few years past, that had them not, but it does now exist. A government without those powers, is one of the improvements with which opposition wish to astonish mankind.

Have not the freest government those powers? And are they not in the fullest exercise of them? This is a thing so clear, that really it is impossible to find facts or reason more clear, in order to illustrate it. Can we create a government without the power to act; how can it act without the assistance of men? And how are men to be procured without being paid for their services? Is not the one power the consequence of the other?

We are told, and it is the last and heaviest charge, "that this government is an aristocracy, and was *intended* so to be by the late convention;" and we are told (the truth of which is not disputed) that an aristocratical government is incompatible with freedom. I hope, before this charge is believed, some stronger

reasons will be given in support of it, than any that have yet been produced.

The late convention were assembled to devise some plan for the security, safety and happiness of the people of the United States; if they have devised a plan, that robs them of their power, and constitutes an aristocracy, they are the parricides of their country, and ought to be punished as such. What part of this system is it that warrants the charge?

What is an aristocratick government? I had the honour of giving a definition of it at the beginning of our debates; it is, Sir, the government of a few over the many, elected by themselves, or possessing a share in the government by inheritance, or in consequence of territorial rights, or some quality independent of the choice of the people; this is an aristocracy, and this constitution is said to be an aristocratical form of government, and it is also said that it was intended so to be by the members of the late convention who framed it. What peculiar rights have been reserved to any class of men, on any occasion? Does even the first magistrate of the United States draw to himself a single privilege, or security that does not extend to every person throughout the United States? Is there a single distinction attached to him in this system, more than there is to the lowest officer in the republick? Is there an office from which any one set of men whatsoever are excluded? Is there one of any kind in this system but is as open to the poor as to the rich? To the inhabitant of the country, as well as to the inhabitant of the city? And are the places of honour and emoluments confined to a few? And are these few the members of the late convention? Have they made any particular provisions in favour of themselves, their relations, or their posterity? If they have committed their country to the demon of aristocracy, have they not committed themselves also, with every thing they held near and dear to them?

Far, far other is the genius of this system. I have had already the honour of mentioning its general nature; but I will repeat it, Sir. In its principle, it is purely democratical; but its parts are calculated in such manner, as to obtain those advantages also, which are peculiar to the other forms of government in other countries. By appointing a single magistrate, we

secure strength, vigour, energy and responsibility in the executive department. By appointing a Senate, the members of which are elected for six years, yet by a rotation already taken notice of, they are changing every second year, we secure the benefit of experience, while, on the other hand, we avoid the inconveniences that arise from a long and detached establishment. This body is periodically renovated from the people, like a tree, which, at the proper season, receives its nourishment from its parent earth.

In the other branch of the legislature, the House of Representatives, shall we not have the advantages, of benevolence and attachment to the people, whose immediate representatives they are?

A free government has often been compared to a pyramid. This allusion is made with peculiar propriety in the system before you; it is laid on the broad basis of the people. its powers gradually rise, while they are confined, in proportion as they ascend, until they end in that most permanent of all forms. When you examine all its parts, they will invariably be found to preserve that essential mark of free governments—a chain of connection with the people,

Such, Sir, is the nature of this system of government; and the important question at length presents itself to our view. Shall it be ratified, or shall it be rejected by this convention? In order to enable us still further to form a judgment on this truly momentous and interesting point, on which all we have or can have dear to us on earth, is materially depending, let us for a moment consider the consequences that will result from one or the other measure. Suppose we reject this system of government, what will be the consequence? Let the farmer say, he whose produce remains unasked for; nor can he find a single market for its consumption, though his fields are blessed with luxuriant abundance. Let the manufacturer and let the mechanick say, they can feel and tell their feelings. Go along the wharves of Philadelphia, and observe the melancholy silence that reigns. I appeal not to those who enjoy places and abundance under the present government; they may well dilate upon the easy and happy situation of our country. Let the merchants tell you, what is our commerce; let them say, what has been their situation,

since the return of peace; an era which they might have expected would furnish additional sources to our trade, and a continuance, and even an increase to their fortunes. Have these ideas been realized, or do they not lose some of their capital in every adventure, and continue the unprofitable trade from year to year, subsisting under the hopes of happier times under an efficient general government? The ungainful trade carried on by our merchants, has a baneful influence on the interests of the manufacturer, the mechanick, and the farmer, and these I believe are the chief interests of the people of the United States.

I will go further—is there now a government among us that can do a single act, that a national government ought to do? Is there any power of the United States that can *command* a single shilling? This is a plain and a home question.

Congress may recommend, they can do more, they may require, but they must not proceed one step further.—If things are bad now, and that they are not worse, is only owing to hopes of improvement, or change in the system, will they become better when those hopes are disappointed? We have been told, by honourable gentlemen on this floor (Mr. Smilie, Mr. Findley and Mr. Whitehill) that it is improper to urge this kind of argument in favour of a new system of government, or against the old one: unfortunately, Sir, these things are too severely felt to be omitted; the people feel them; they pervade all classes of citizens, and every situation from New Hampshire to Georgia; the argument of necessity is the patriot's defence, as well as the tyrant's plea.

Is it likely, Sir, that if this system of government is rejected, a better will be framed and adopted? I will not expatiate on this subject, but I believe many reasons will suggest themselves, to prove that such an expectation would be illusory. If a better could be obtained at a future time, is there any thing essentially wrong in this? I go further, is there any thing wrong that cannot be amended more easily by the mode pointed out in the system itself, than could be done, by calling convention after convention, before the organization of the government. Let us now turn to the consequences that will result if we assent to, and ratify the instrument before you. I shall trace them as concisely as

I can, because, I have trespassed already too long on the patience and indulgence of the house.

I stated on a former occasion one important advantage ; by adopting this system, we become a NATION ; at present we are not one. Can we perform a single national act ? Can we do any thing to procure us dignity, or to preserve peace and tranquillity ? Can we relieve the distress of our citizens ? Can we provide for their welfare or happiness ? The powers of our government are mere sound. If we offer to treat with a nation, we receive this humiliating answer. " You cannot in propriety of language make a treaty—because you have no power to execute it." Can we borrow money ? There are too many examples of unfortunate creditors existing, both on this and the other side of the Atlantic, to expect success from this expedient.—But could we borrow money, we cannot command a fund, to enable us to pay either the principal or interest ; for, in instances where our friends have advanced the principal, they have been obliged to advance the interest also, in order to prevent the principal from being annihilated in their hands by depreciation. Can we raise an army ? The prospect of a war is highly probable. The accounts we receive by every vessel from Europe, mention, that the highest exertions are making in the ports and arsenals of the greatest maritime powers ; but, whatever the consequence may be, are we to lay supine ? We know we are unable under the articles of confederation to exert ourselves, and shall we continue so until a stroke be made on our commerce, or we see the debarkation of a hostile army on our unprotected shores ? Who will guarantee that our property will not be laid waste, that our towns will not be put under contribution, by a small naval force, and subjected to all the horror and devastation of war ? May not this be done without opposition, at least effectual opposition, in the present situation of our country ? There may be safety over the Appalachian mountains, but there can be none on our sea-coast. With what propriety can we hope our flag will be respected, while we have not a single gun to fire in its defence ?

Can we expect to make internal improvement, or accomplish any of those great national objects, which I formerly alluded to, when we cannot find money to remove a single rock out of a river ?

This system, Sir, will at least make us a nation, and put it in the power of the union to act as such. We will be considered as such by every nation in the world. We will regain the confidence of our own citizens, and command the respect of others.

As we shall become a nation, I trust that we shall also form a national character; and that this character will be adapted to the principles and genius of our system of government, as yet we possess none—our language, manners, customs, habits and dress, depend too much upon those of other countries. Every nation in these respects should possess originality; there are not on any part of the globe finer qualities, for forming a national character, than those possessed by the children of America. Activity, perseverance, industry, laudable emulation, docility in acquiring information, firmness in adversity, and patience and magnanimity under the greatest hardships; from these materials, what a respectable national character may be raised! In addition to this character, I think there is strong reason to believe, that America may take the lead in literary improvements and national importance. This is a subject, which I confess, I have spent much pleasing time in considering. That language, Sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now know. The French, indeed, have made laudable attempts towards establishing a universal language, but, beyond the boundaries of France, even the French language is not spoken by one in a thousand. Besides, the freedom of our country, the great improvements she has made and will make in the science of government, will induce the patriots and literati of every nation, to read and understand our writings on that subject, and hence it is not improbable that she will take the lead in political knowledge.

If we adopt this system of government, I think we may promise security, stability and tranquillity to the governments of the different states. They will not be exposed to the danger of competition on questions of territory, or any other that have heretofore disturbed them. A tribunal is here founded to decide, justly and quietly, any interfering claim; and now is accomplished,

what the great mind of Henry the fourth of France had in contemplation, a system of government, for large and respectable dominions, united and bound together in peace, under a superintending head, by which all their differences may be accommodated, without the destruction of the human race! We are told by Sully, that this was the favourite pursuit of that good King during the last years of his life, and he would probably have carried it into execution, had not the dagger of an assassin deprived the world of his valuable life. I have, with pleasing emotion, seen the wisdom and beneficence of a less efficient power under the articles of confederation, in the determination of the controversy between the states of Pennsylvania and Connecticut; but, I have lamented, that the authority of Congress did not extend to extinguish, entirely, the spark which has kindled a dangerous flame in the district of Wyoming.

Let gentlemen turn their attention to the amazing consequences which this principle will have in this extended country—the several states cannot war with each other; the general government is the great arbiter in contentions between them; the whole force of the union can be called forth to reduce an aggressor to reason. What a happy exchange for the disjointed contentious state-sovereignties!

The adoption of this system will also secure us from danger, and procure us advantages from foreign nations. This in our situation, is of great consequence. We are still an inviting object to one European power at least, and, if we cannot defend ourselves the temptation may become too alluring to be resisted. I do not mean, that, with an efficient government, we should mix with the commotions of Europe. No, Sir, we are happily removed from them, and are not obliged to throw ourselves into the scale with any. This system will not hurry us into war, it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war, is vested in the legislature at large;—this declaration must be made with the concurrence of the House of Representatives; from this circumstance we may draw a certain conclusion, that nothing but our national interest can draw us into a war. I cannot forbear, on this occasion, the pleasure of mentioning to you the sentiments

of the great and benevolent man whose works I have already quoted on another subject; Mr. Neckar, has addressed this country, in language important and applicable in the strictest degree to its situation and to the present subject. Speaking of war, and the great caution that all nations ought to use in order to avoid its calamities.—“ And you, rising nation, says he, whom generous efforts have freed from the yoke of Europe! Let the universe be struck with still greater reverence at the sight of the privileges you have acquired, by seeing you continually employed for the publick felicity: do not offer it as a sacrifice at the unsettled shrine of political ideas, and of the deceitful combinations of warlike ambition; avoid, or at least delay participating in the passions of our hemisphere; make your own advantage of the knowledge which experience alone has given to our old age, and preserve for a long time, the simplicity of childhood: in short, honour human nature, by showing that when left to its own feelings, it is still capable of those virtues that maintain publick order, and of that prudence which insures publick tranquillity.”

Permit me to offer one consideration more that ought to induce our acceptance of this system. I feel myself lost in the contemplation of its magnitude. By adopting this system, we shall probably lay a foundation for erecting temples of liberty, in every part of the earth. It has been thought by many, that on the success of the struggle America has made for freedom, will depend the exertions of the brave and enlightened of other nations. The advantages resulting from this system, will not be confined to the United States: it will draw from Europe, many worthy characters, who pant for the enjoyment of freedom. It will induce princes, in order to preserve their subjects, to restore to them a portion of that liberty of which they may have for many ages been deprived. It will be subservient to the great designs of providence, with regard to this globe; the multiplication of mankind, their improvement in knowledge, and their advancement in happiness.

Mr. M'KEAN.—Sir, you have under your consideration a matter of very great weight and importance, not only to the present generation but to posterity; for where the rights and liberties

of the people are concerned, there certainly it is fit to proceed with the utmost caution and regard. You have done so hitherto. The power of this convention, being derived from the people of Pennsylvania, by a *positive* and *voluntary* grant, cannot be extended farther than what this *positive grant* hath conveyed.— You have been chosen by the people, for the sole purpose of “assenting to and ratifying the constitution, proposed for the future government of the United States, with respect to their general and common concerns”, or of rejecting it. It is a sacred trust; and, as on the one hand, you ought to weigh well the innovations it will create in the governments of the individual states, and the dangers which may arise by its adoption; so upon the other hand, you ought fully to consider the benefits it may promise, and the consequences of a rejection of it. You have hitherto acted strictly conformably to your delegated power; you have agreed, that a single question can come before you; and it has been accordingly moved, that you resolve, “to assent to and ratify this constitution.” Three weeks have been spent in hearing the objections that have been made against it, and it is now time to determine, whether they are of such a nature as to overbalance any benefits or advantages that may be derived to the state of Pennsylvania by your accepting it.

Sir, I have as yet taken up but little of your time; notwithstanding this, I will endeavour to contract what occurs to me on the subject: and in what I have to offer, I shall observe this method; I will first consider the arguments that have been used against this constitution, and then give my reasons, why I am for the motion.

The arguments against the constitution are, I think, chiefly these.

First. That the elections of representatives and senators are not frequent enough to ensure responsibility to their constituents.

Second. That one representative for thirty thousand persons is too few.

Third. The senators have a share in the appointment of certain officers, and are to be the judges on the impeachment of such officers. This is blending the executive with the legislative and judicial department, and is likely to screen the offenders im-

peached, because of the concurrences of a majority of the Senate in their appointment.

Fourth. That the Congress may by law deprive the electors of a fair choice of their representatives, by fixing improper times, places and modes of election.

Fifth. That the powers of Congress are too large, particularly in laying internal taxes and excises, because they may lay excessive taxes, and leave nothing for the support of the state-governments.

In raising and supporting armies, and that the appropriation of money for that use, should not be for so long a term as two years.

In calling forth the militia on necessary occasions; because they may call them from one end of the continent to the other, and wantonly harass them: besides they may coerce men to act in the militia, whose consciences are against bearing arms in any case.

In making all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

And in declaring, that this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.

That migration or importation of such persons, as any of the states shall admit, shall not be prohibited prior to 1808, nor a tax or duty imposed on such importation exceeding ten dollars for each person.

Sixth. That the whole of the executive power is not lodged in the President alone, so that there might be one responsible person.

That he has the sole power of pardoning offences against the United States, and may therefore pardon traitors, for treasons committed in consequence of his own ambitious and wicked projects, or those of the Senate.

That the vice-president is a useless officer, and being an executive officer, is to be president of the Senate, and in case of a division is to have the casting vote.

Seventh. The judicial power shall be vested in one Supreme Court. An objection is made, that the *compensation* for the services of the judges shall not be *diminished* during their continuance in office, and this is contrasted with the compensation to the President, which is to be neither *increased* nor *diminished* during the period for which he shall have been elected: but that of the judges may be increased, and the judge may hold other offices of a lucrative nature, and his judgment be thereby warped.

That in all the cases enumerated, except where the Supreme Court has original jurisdiction, "they shall have *appellate* jurisdiction, both as to law and facts, with such exceptions, and under such regulations as the Congress shall make." From hence is inferred that the trial by jury is not secured.

That they have jurisdiction between citizens of different states.

Eighth. That there is no bill or declaration of rights in this constitution.

Ninth. That this is a *consolidation* of the several states, and not a *confederation*.

Tenth. It is an *aristocracy*, and was intended to be so by the framers of it.

The first objection that I heard advanced against this constitution, I say, Sir, was that the elections of representatives and senators are not frequent enough to ensure responsibility to their constituents.

This is a subject that most men differ about, but there are more considerations than that of mere responsibility. By this system the House of Representatives is composed of persons, chosen every second year by the people of the several states; and the senators every six years by the legislatures: whether the one or the other of these periods are of too long duration, is a question to which various answers will be given; some persons are of opinion that three years in the one case, and seven in the other, would be a more eligible term, than that adopted in this constitution. In Great Britain, we find the House of Commons elected for seven years; the House of Lords is perpetual, and the King never dies. The Parliament of Ireland is octennial, in various other parts of the British dominions, the House of Repre-

representatives are during the royal pleasure, and have been continued twenty years; this, Sir, is a term undoubtedly too long. In a single state, I think annual elections most proper, but then there ought to be more branches in the legislature than one. An annual legislature possessed of supreme power, may be properly termed an annual despotism—and, like an individual, they are subject to caprice, and act as party-spirit or spleen dictates; hence that instability to our laws, which is the bane of republican governments. The framers of this constitution wisely divided the legislative department, between two houses subject to the qualified negative of the President of the United States, though this government embraces only enumerated powers. In a single state, annual elections may be proper, the more so, when the legislative powers extend to all cases; but in such an extent of country as the United States, and when the powers are circumscribed, there is not that necessity, nor are the objects of the general governments of that nature as to be acquired immediately, by every capacity. To combine the various interest of thirteen different states, requires more extensive knowledge than is necessary for the legislature of any one of them; two years are therefore little enough, for the members of the House of Representatives to make themselves fully acquainted with the views, the habits and the interests of the United States. With respect to the Senate, when we consider the trust reposed in them, we cannot hesitate to pronounce, the period assigned to them is short enough; they possess, in common with the House of Representatives, legislative power, with its concurrence they also have power to declare war; they are joined with the President in concluding treaties; it therefore behoves them to be conversant with the politicks of the nations of the world, and the dispositions of the sovereigns, and their ministers;—this requires much reading and attention. And believe me, the longer a man bends his study to any particular subject, the more likely he is to be master of it. Experience and practice will assist genius and education. I therefore think the time allowed, under this system, to both houses, to be extremely proper. This objection has been made repeatedly, but it can only have weight with those who are not at the pains of thinking on the subject. When any thing, Sir, new or great, is done, it is very apt to create a fer-

ment among those out of doors, who as they cannot always enter into the depth and wisdom of counsels, are too apt to censure what they do not understand; upon a little reflection and experience, the people often find that to be a singular blessing which at first they deemed a curse.

Second. "That one representative for thirty thousand persons is too few."

There will be, Sir, sixty-five in the House of Representatives and twenty-six in the Senate, in all ninety-one, who together with the President, are to make laws in the several particular matters intrusted to them, and which are all enumerated and expressed. I think the number sufficient at the present, and in three years' time, when a census or actual enumeration must take place, they will be increased, and in less than twenty-five years they will be more than double. With respect to this, different gentlemen in the several states will differ, and at last the opinion of the majority must govern.

Third. "The senators have a share in the appointment of certain officers, and are to be the judges on the impeachment of such officers. This is blending the executive with the legislative and judicial department, and is likely to screen the offenders impeached, because of the concurrence of a majority of the senate in their appointment."

The President is to nominate to office, and with the advice and consent of the Senate appoint officers, so that he is the responsible person, and when any such impeachment shall be tried, it is more than probable, that not one of the Senate, who concurred in the appointment, will be a senator, for the seats of a third part are to be vacated every two years, and of all in six.

As to the senators having a share in the executive power, so far as to the appointment of certain officers, I do not know where this restraint on the President could be more safely lodged. Some may think a privy-counsellor might have been chosen by every state, but this could little mend the matter if any, and it would be a considerable additional expense to the people. Nor need the Senate be under any necessity of sitting constantly, as has been alleged, for there is an express provision made to enable the President to fill up all vacancies that may happen during

their recess; the commissions to expire at the end of the next session.

As to impeachments, the objection is much stronger against the supreme executive council of Pennsylvania.

The House of Lords in Great Britain, are judges in the last resort in all civil causes, and besides have the power of trying impeachments.

On the trial of impeachments, the senators are to under the sanction of an oath or affirmation, besides the other ties upon them to do justice; and the bias is more likely to be against the officer accused, than in his favour, for there are always more persons disobliged than the contrary when an office is given away, and the expectants of office are more numerous than the possessors.

Fourth. That the Congress may by law deprive the electors of a fair choice of their representatives, by fixing improper times, places and modes of election."

Every House of Representatives are of necessity to be the judges of the elections, returns and qualifications of its own members. It is therefore their province, as well as duty, to see, that they are fairly chosen, and are the legal members; for this purpose, it is proper they should have it in their power to provide, that the times, places and manner of election, should be such as to ensure free and fair elections.

Annual Congress are expressly secured; they have only a power given to them, to take care, that the elections shall be at convenient and suitable times and places, conducted in a proper manner; and I cannot discover why we may not intrust these particulars to the representatives of the United States, with as much safety as to those of the individual states.

In some states the electors vote *viva voce*, in others, by ballot; they ought to be uniform, and the elections held on the same day throughout the United States, to prevent corruption or undue influence. Why are we to suppose, that Congress will make a bad use of this power, more than the representatives in the several states?

It is said "that the powers of Congress, under this constitution, are too large, particularly in laying internal taxes and excises, because they may lay excessive taxes, and leave nothing

for the support of the state-governments." Sir, no doubt but you will discover, on consideration, the necessity of extending these powers to the government of the union. If they have to borrow money, they are certainly bound in honour and conscience to pay the interest, until they pay the principal, as well to the foreign as to the domestick creditor; it therefore becomes our duty to put it in their power to be honest. At present, Sir, this is not the case, as experience has fully shown. Congress have solicited and required the several states to make provision for these purposes; has one state paid its quota? I believe not one of them; and what has been the result? Foreigners have been compelled to advance money, to enable us to pay the interest due them on what they furnished to Congress during the late war. I trust, we have had experience enough to convince us, that Congress ought no longer to depend upon the force of requisition. I heard it urged, that Congress ought not to be authorized to collect taxes, until a state had refused to comply with this requisition. Let us examine this position. The engagements entered into by the general government, render it necessary that a certain sum shall be paid in one year; notwithstanding this, they must not have power to collect it until the year expires, and then it is too late. Or is it expected that Congress would borrow the deficiency? Those who lend us in our distress, have little encouragement to make advances again to our government; but give the power to Congress to lay such taxes as may be just and necessary, and publick credit will revive; yet, because they have the power to lay taxes and excise, does it follow that they *must*? For my part, I hope it may not be necessary; but if it is, it is much easier for the citizens of the United States to contribute their proportion, than for a few to bear the weight of the whole principal and interest of the domestick debt; and there is perfect security on this head, because the regulation must equally affect every state, and the law must originate with the immediate representatives of the people, subject to the investigation of the state-representatives. But is the abuse an argument against the use of power? I think it is not; and, upon the whole, I think this power wisely and securely lodged in the hands of the general government; though on the first view of this work, I was of opinion they might have done without it; but, Sir, on reflection,

I am satisfied that it is not only proper, but that our political salvation may depend upon the exercise of it.

The next objection is against "the power of raising and supporting armies, and the appropriation of money for that use, should not be for so long a term as two years." Is it not necessary that the authority superintending the general concerns of the United States, should have the power of raising and armies? Are we, Sir, to stand defenceless amidst conflicting nations? Wars are inevitable, but war cannot be declared without the consent of the immediate representatives of the people; there must also *originate* the law which appropriates the money for the support of the army, yet they can make no appropriation for a longer term than two years; but does it follow that because they *may* make appropriations for that period, that they *must* or even *will* do it? The power of raising and supporting armies, is not only necessary, but is enjoyed by the present Congress, who also judge of the expediency or necessity of keeping them up. In England there is a standing army, though in words it is engaged but for one year, yet is it not kept constantly up? Is there a year that Parliament refuses to grant them supplies? Though this is done annually, it might be done for any longer term. Are not their officers commissioned for life? And when *they* exercise this power with so much prudence, shall the representatives of this country be suspected the more, because they are restricted to two years?

It is objected that the powers of Congress are too large, because "they have the power of calling forth the militia on necessary occasions, and may call them from one end of the continent to the other, and wantonly harass them; besides they may coerce men to act in the militia whose consciences are against bearing arms in any case." It is true, by this system, power is given to Congress to organize, arm, and discipline the militia, but every thing else is left to the state-governments; they are to officer and train them: Congress have also the power of calling them forth, for the purpose of executing the laws of the union, suppressing insurrections and repelling invasions; but can it be supposed they would call them in such case from Georgia to New Hampshire? Common sense must oppose the idea.

Another objection was taken from these words of the constitution: "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department, or officer thereof." And in declaring "that this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;" this has at last been conceded, that though it is explicit enough, yet it gives to Congress no further powers than those already enumerated. Those that first said it gave to Congress the power of superseding the state-governments, cannot persist in it; for no person can, with a tolerable face, read the clauses over, and infer that such may be the consequence.

Provision is made that Congress shall have power to prohibit the importation of slaves after the year 1808, but the gentlemen in opposition, accuse this system of a crime, because it has not prohibited them at once. I suspect those gentlemen are not well acquainted with the business of the diplomatick body, or they would know that an agreement might be made, that did not perfectly accord with the will and pleasure of any one person. Instead of finding fault with what has been gained, I am happy to see a disposition in the United States to do so much.

The next objections have been against the executive power; it is complained of "because the whole of the executive power is not lodged in the President *alone*, so that there might be one responsible person; he has the *sole* power of pardoning offences against the United States, and may therefore pardon traitors, for treasons committed in consequence of his own ambitious or wicked prospects, or those of the Senate."

Observe the contradiction, Sir, in these two objections; one moment the system is blamed for not leaving all executive authority to the President *alone*, the next is censured for giving him the *sole* power to pardon traitors. I am glad to hear these objections made, because it forebodes an amendment in that body in which amendment is necessary. The President of the United States must nominate to all offices, before the persons can be chosen; he here consents and becomes liable. The execu-

tive council of Pennsylvania, appoint officers by ballot, which effectually destroys responsibility. He may pardon offences, and hence it is inferred that he may pardon traitors, for treason committed in consequence of his own ambitious and wicked projects. The executive council of Pennsylvania can do the same. But the President of the United States may be impeached before the Senate and punished for his crimes.

"The vice-president is a useless officer;" perhaps the government might be executed without him, but there is a necessity of having a person to preside in the Senate, to continue a full representation of each state in that body. The chancellor of England is a judicial officer, yet he sits in the House of Lords.

The next objection is against the judicial department. The judicial power shall be vested in one Supreme Court. An objection is made that the compensation for the services of the judges shall not be *diminished* during their continuance in office, and this is contrasted with the compensation of the President, which is to be neither *increased* nor *diminished*, during the period for which he shall be elected. But that of the judges may be increased, and the judges may hold other offices of a lucrative nature, and his judgment be thereby warped.

Do gentlemen not see the reason why this difference is made? Do they not see that the President is appointed but for four years, whilst the judges may continue for life, if they shall so long behave themselves well? In the first case, little alteration can happen in the value of money, but in the course of a man's life, a very great one may take place from the discovery of silver and gold mines, and the great influx of those metals; in which case an increase of salary may be requisite. A security that their compensation shall not be lessened, nor they have to look up to every session for salary, will certainly tend to make those officers more easy and independent.

"The judges may hold other offices of a lucrative nature:" this part of the objection reminds me of the scheme that was fallen upon in Pennsylvania, to prevent any person from taking up large tracts of land: a law was passed restricting the purchaser to a tract not exceeding three hundred acres; but all the difference it made, was, that the land was taken up by several

patents, instead of one, and the wealthy could procure, if they chose it, three thousand acres. What though the judges could hold no other office, might they not have brothers, children and other relations, whom they might wish to see placed in the offices forbidden to themselves? I see no apprehensions that may be entertained on this account.

That in all cases enumerated, except where the Supreme Court has original jurisdiction, "they shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make." From this is inferred, that the trial by jury is not secured; and an objection is set up to the system, because they have jurisdiction between citizens of different states. Regulations, under this head, are necessary, but the convention could form no one that would have suited each of the United States. It has been a subject of amazement to me, to hear gentlemen contend that the verdict of a jury shall be without revision in all cases. Juries are not infallible because they are twelve in number. When the law is so blended with the fact, as to be almost inseparable, may not the decision of a jury be erroneous? Yet notwithstanding this, trial by jury is the best mode that is known. Appellate jurisdiction, Sir, is known in the common law, and causes are removed from inferior courts by writ of error into some Court of Appeal. It is said that the lord chancellor, in all cases, sends down to the lower courts when he wants to determine a fact, but that opinion is not well founded, because he determines nineteen out of twenty, without the intervention of any jury. The power to try causes between citizens of different states, was thought by some gentlemen invidious; but I apprehend they must see the necessity of it, from what has been already said by my honourable colleague.

"That there is no bill or declaration of rights in this constitution."

To this I answer, such a thing has not been deemed essential to liberty, excepting in Great Britain, where there is a King and a House of Lords, quite distinct with respect to power and interest from the rest of the people; or in Poland, the *pacta conventa*, which the King signs before he is crowned, and in six states of the American United States.

Again, because it is unnecessary ; for the powers of Congress, being derived from the people in the mode pointed out by this constitution, and being therein enumerated and *positively* granted, can be no other than what this positive grant conveys.*

With respect to executive officers, they have no manner of authority, any of them, beyond what is, by *positive* grant and commission, delegated to them.

“ That this is a *consolidation* of the several states, and not a *confederation* :”

To this I answer, the name is immaterial—the thing unites the several states, and makes them like one in particular instances and for particular purposes, which is what is ardently desired by most of the sensible men in this country. I care not, whether it is called a consolidation, confederation, or national government, or by what other name, if it is a good government, and calculated to promote the blessings of liberty, tranquillity and happiness.

“ It is an *aristocracy*, and was intended to be so by the framers of it :”

Here again, Sir, the name is immaterial, if it is a good system of government for the general and common concerns of the United States. But after the definition which has already been given of an aristocratick government, it becomes unnecessary to repeat arguments to prove that this system does not establish an aristocracy.

There have been some other small objections to, or rather criticisms on this work, which I rest assured the gentlemen who made them, will, on reflection, excuse me in omitting to notice them.

Many parts of this constitution have been wrested and tortured, in order to make way for shadowy objections, which must have been observed by every auditor. Some other things were said with acrimony ; they seemed to be personal ; I heard the sound, but it was inarticulate. I can compare it to nothing better, than the feeble noise occasioned by the working of small beer.

* Locke, on civil government, vol. 2, b. 2, chap. ii. sect. 141, and chap. xiii. sect. 152.

It holds in argument as well as nature, that *destructio unius est generatio alterius*—the refutation of an argument begets a proof.

The objections to this constitution having been answered, and all done away, it remains pure and unhurt, and this alone is a forcible argument of its goodness.

Mr. president, I am sure nothing can prevail with me to give my vote for ratifying this constitution, but a conviction from comparing the arguments on both sides, that the not doing it, is liable to more inconvenience and danger, than the doing it.

First. If you do it, you strengthen the government and people of the United States, and will thereby have the wisdom and assistance of all the states.

Second. You will settle, establish and firmly perpetuate our independence, by destroying the vain hopes of all its enemies, both at home and abroad.

Third. You will encourage your allies to join with you: nay to depend, that what hath been stipulated or shall hereafter be stipulated and agreed upon, will be punctually performed, and other nations will be induced to enter into treaties with you.

Fourth. It will have a tendency to break our parties and divisions, and by that means, lay a firm and solid foundation for the future tranquillity and happiness of the United States in general, and of this state in particular.

Fifth. It will invigorate your commerce, and encourage ship-building.

Sixth. It will have a tendency not only to prevent any other nation from making war upon you, but from offering you any wrong or even insult.

In short, the advantages that must result from it, are obviously so numerous and important, and have been so fully and ably pointed out by others, that it appears to be unnecessary to enlarge on this head.

Upon the whole, Sir, the law has been my study from my infancy, and my only profession. I have gone through the circle of office, in the legislative, executive and judicial departments of government; and from all my study, observation and experience, I must declare, that from a full examination and due

consideration of this system, it appears to me the *best the world has yet seen*.

I congratulate you on the fair prospect of its being adopted, and am happy in the expectation of seeing accomplished, what has been long my ardent wish—that you will hereafter have a **SALUTARY PERMANENCY, in magistracy and STABILITY IN THE LAWS.**

BIOGRAPHY.

GEN. ALEXANDER HAMILTON.

[FROM THE PROVIDENCE AMERICAN.]

“THE publick have for a long time waited for the biography of General ALEXANDER HAMILTON. They have a right to expect it, and it is hoped such expectations will not be disappointed. The busts of that excellent man, so frequently seen in the shop of the mechanick, in the counting-house of the merchant, on the side-board of opulence, and in the closet of the scholar, are decisive proofs of the deep interest which all classes of the community feel in his character, and of the undissembled sorrow for their melancholy bereavement. A writer who had a proper conception of his character, would pause before he entered on his biography. He would doubt the ability of his own talents to do justice to that virtue which now blazes with such splendour from the grave, when viewed on the publick side; and which shines with so soft and delicate a lustre when seen from the side that turns to the eye, through the mild medium of private and domestick intercourse. Traits so opposite and almost irreconcilable, save in HAMILTON, demand the efforts of a master hand to expose.—Without any faith in the dogmas of Lavater, we will venture to pronounce the bust of HAMILTON a complete exposition of the character which we had previously formed of

the man. Draw a handkerchief around the mouth of the bust, and the remnant of the countenance represents fortitude and intrepidity, such as we have often seen in the plates of Roman heroes. Veil, in the same manner the face and leave the mouth and chin only discernable, and all this fortitude melts and vanishes into almost feminine softness. The editor of the New York Evening Post knew him well; we believe him the only person qualified for his biography, and it is his duty to write it."

REMARKS.—The very high, and certainly unmerited compliment paid to myself in the above article, has hitherto prevented its republication in my own paper, although it has for some time been in my power to give the publick the assurance so eagerly desired by the writer of the above. But the world are now witnessing with astonishment and grief the malicious attempts to sully the posthumous fame of the purest patriot and greatest statesman ancient or modern times, could boast. But all will not avail. The name of HAMILTON will survive all these impotent attempts to injure it.

Duncan in his grave ;
 " After life's fitful fever, he sleeps well ;
 " Treason has done his worst ; nor steel, nor poison,
 " Malice domestick, foreign levy, nothing
 " Can touch him further !"

With what satisfaction do I now announce that the biography of HAMILTON has been undertaken by one every way competent to the task ! I am not at liberty to mention the name of the biographer or make any allusions to him, but I am much mistaken if the work will not be found to rank among the ablest and most valuable as well as interesting productions in the English language. Yet impatience is not to be gratified by a hasty, half-digested performance. The writer is a man of too much sense and has too just an opinion of the great importance of his subject to believe he can dispose of it, in one, two or perhaps seven years. A classical scholar of the first pretensions, he too justly appreciates the *nonum prematur in annum*, to promise his work at any early period. I trust a suitable niche will be found for HAMILTON's calumniator; and though pity would willingly spare, justice urges her stern claims on the historian, in a voice that cannot fail to be audibly heard.—[N. Y. Evening Post.]

CHARACTER OF FISHER AMES.

THE abuse, which we often perceive, of the sacred task of eulogy on departed worth, has rendered it almost disgusting. The disposition so prevalent to substitute hyperbole to truth, especially when describing the merits of departed friends, makes it sometimes doubtful whether pre-eminent virtues should not be left to form their own deep and solemn eulogies in the minds of those who were witnesses of them. But it is difficult, if not impossible to restrain our feelings, and every man who is profoundly impressed with the extraordinary merits of a deceased friend, will feel it a duty which no minor considerations can induce him to forego, to bear his testimony to their excellence. But to give any value to such a tribute, the writer must resolve to banish that meretricious pomp of high sounding phrases, that unmeaning common-place praise so often falsely and absurdly lavished on objects unworthy of the publick regard.

In the character of MR. AMES, our own state, our nation indeed has much of which it may justly be proud. His example is invaluable to statesmen; to our citizens at large, and to the promising part of our youth it is inestimable. It would not be extravagant to say, that under all aspects, he was one of the first men of the age. If health, if ambition, if fortune, if a desire of distinction had co-operated with his profound and unexampled genius, it is hardly possible to say to what a height of reputation he might have attained. But a feeble and morbid physical constitution, an unconquerable modesty, and an unfeigned and invincible attachment to domestick enjoyments, restrained the range of a mind which indulgent nature had rendered almost uncontrollable in its powers.

The *little* which the publick know of the character of MR. AMES would be deemed *much* of any other man; but his intimate friends, those who enjoyed and were honoured and delighted

with his conversation and friendship, are sensible that the world knew but little of his talents or merit.

Of the vivacity, fertility, and richness of his imagination, every man who had the smallest pretension to taste, learning, or discrimination, can bear the most ample testimony. In this respect he stands without a rival in our own country, and if we can be permitted to judge from the printed works of cotemporaneous Europeans, there has been but one man of his age who can be placed in comparison with him. If *Mr. BURKE* excelled him in the richness and variety of his imagery, in the beauty and aptitude of his classick allusions, it can be attributed only to the superior advantages of an early and excellent education, and to more extended practice in the best school of modern eloquence, the British Parliament.

If the health of *Mr. AMES* had permitted him to pursue his natural disposition for political disquisition, and parliamentary discussion, and if he had lived to the mature age of *Mr. BURKE*, it is to be doubted whether he would not have been a very formidable rival to that unequalled statesman.

But the exuberance and chastity of *Mr. AMES's* imagination were among the smallest of his talents, as they were of no account in comparison with his publick and private virtues. The profoundness of his mind, the extent and correctness of his political and moral reflections, far exceeded the splendour and inexhaustible fertility of his fancy. No man ever entered his society without being informed, and few quitted it without being improved. The most abstract thoughts, the most profound ideas seemed to flow from him without any mental exertion. Although capable of entering into abstruse disquisitions on every subject, yet a natural bias to politicks, the habits of early life, and a patriotism sincere, strong, and ardent even in death, led him chiefly to confine his vast mind to the political situation of the world and more especially of his own country. Living in an age the most changeful, and the most eventful, he gave full scope to his deep and penetrating understanding. He perceived the causes and the consequences of passing measures unnoticed by thoughtless and vulgar statesmen; and if his prophecies of future events should be as strictly fulfilled *hereafter* as they have *heretofore* been, his surviving fellow-patriots have no small reason of disquiet and apprehension.

He was one of the few men who foresaw and foretold the frightful despotism which would terminate the French revolution; and if his predictions of the effects of the influence of aspiring demagogues are (as they are likely to be) as literally fulfilled in our own country, this amiable and regretted prophet has not found too early a grave.

Of the events of such a man's life, shrinking from public notice, and dreading public distinction, courting only domestick and literary enjoyments, little ought to be said, because, although distinguished and honoured by his country, he conferred more honour than he received.

Let those who have no other merit than official distinctions retail the long catalogue of their titles, it is sufficient to say of Mr. AMES, that in the few offices into which he was forced, he rendered his country services which *no other man* could render, and he left behind him in the councils of the nation, an example and reputation, which it is, and ought to be the pride of his successors to imitate, though *few* can hope to equal.

Of his *brightest, best* traits, those of domestick and retired life, those which ornamented and exalted the *man* above the *statesman*, one would never be weary in their praise. But there was a tenderness and delicacy which his inestimable softness of character excited in his relations and friends, which ought not to be wounded. Of *such* sentiments and *such* sensibilities, those who did not know him cannot judge. Their loss can never be too much deplored, their wounds can never be healed, the world can never repair the one, or cure the other.

Questions respecting Maritime Concerns.

ACCORDING to the principle or usage, what is the evidence to be given of national character between armed vessels of different powers at sea?

In those parts of the ocean which are common to all, have publick armed vessels the right to ask and ascertain the national character of other vessels if armed?

How are regularly commissioned vessels of war, whether publick vessels or privateers, to be distinguished at sea from pirates or unauthorized corsairs?

How far is the publick armed vessel of one power warranted in principle to show colours of another power, or to disguise its character?

What privilege at sea is attached to the national character of an armed vessel whether belligerent or neutral, before such character is declared or made known?

What is the rule as to salutations between publick armed vessels of different powers, or between such vessels and privateers or merchant vessels, on the main ocean?

To ascertain the character of an armed vessel at sea, may a publick vessel regularly commissioned give chase?

Are there, or are there not, any cases in which a regularly commissioned vessel of a neutral power may give chase within a maritime league of the shore of its own country, or while in sight of land, or while on soundings, or elsewhere on the ocean?

May the publick armed vessel of one power on the main ocean, demand of the publick armed vessel of another power the seamen belonging to the country of the vessel making the demand?

Is the commander of the vessel so applied bound to give the names of all such seamen, if the application be general, or is he bound to answer to such a general inquiry, or to a question respecting any particular seaman or seamen?

If he answers, is he or is he not bound to answer according to the truth?

If in his answer he acknowledges any such seaman to be on board but refuses to deliver him up, what then is the duty of the commander who made application for the seaman?

ILLEGITIMATE CHILDREN.

AN argument, (says a late London paper) as curious as it is interesting, is depending, respecting the marriage of illegitimate children. The case before the court upon this subject is as follows :—A gentleman dying, left his natural daughter a very considerable estate. At that period she was living under the guardianship of her mother, and before she attained the age of 21, she was married with her mother's consent. The question before the court is, whether the issue of that marriage can inherit the estate left by the grandfather. The legitimate issue of the grandfather say they cannot, and seek to recover it back.

The argument in support of that position is, that natural children, in contemplation of law, have no father nor mother, and consequently the marriage above alluded to, by the provisions of the marriage-act, is null and void, as the mother could not make the marriage binding by her consent ; and the natural daughter being in that case married without the consent of a legal parent, and she being a minor at the time, the issue of marriage are bastardized, and the estate must revert back to the legitimate issue of the grandfather. The reply is, that the mother of a natural daughter is a parent for the purpose of assenting or dissenting to her marriage when a minor ; but if she is not a parent within the meaning of the act, then are the issue no children within the meaning of the act, and the suit must fail.

If the act recognized none but legal parents, then could it recognize none but legitimate children ; so that, whichever way the argument shaped itself, the issue of the marriage could not be deprived of the estate in question.

The court took time to consider of their judgment.

No. XV.

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SPEECH OF MISS POLLY BAKER,

*Delivered before a Court of Judicature in Connecticut,
New England, where she was prosecuted for having a
bastard child.*

May it please the honourable bench, to indulge me in a few words:—I am a poor, unhappy woman, who have no money to fee lawyers to plead for me, being hard put to it to get a tolerable living.

I shall not trouble your honours with a long speech, for I have not the presumption to expect, that you may by any means be prevailed on to deviate in your sentence from the law in my favour. All I humbly hope is, that your honours would charitably move the governour's goodness in my behalf, that my fine may be remitted. This is the fifth time, gentlemen, that I have been dragged before your court on the same account; twice I have paid heavy fines, and twice have been brought to publick punishment, for want of money to pay those fines. This may have been agreeable to the laws, and I don't dispute it, but since laws are sometimes unreasonable in themselves, and therefore repealed; and others bear too hard on the subject in particular circumstances, and therefore there is left a power somewhat to dispense with the execution of them. I take the liberty to say, that I think this law, by which I am punished, is both unreasonable in itself, and particularly severe with regard to me, who have always lived an inoffensible life in the neighbourhood where I was born; and defy my enemies, if I have any, to say I ever wronged man, woman, or child. Abstracted from the law, I cannot perceive, may it please your honours, what the nature of my offence is.

I have brought five fine children into the world at the risk of my life, and have maintained them well by my own industry, without burthening the township; and should have done it better, if it had not been for the heavy charges and fines I have paid.

Can it be a crime, in the nature of things, I mean, to add to the number of useful citizens in a new country that really wants people? I own it.—I should think it praise-worthy rather than a punishable action. I have debauched no other woman's husband, nor enticed any youth: these things I never was charged with, nor has any one the least cause of complaint against me, unless perhaps the minister or justice, because I have had children without being married, by which they have missed a wedding fee. But can even this be a fault of mine? I appeal to your honours. You are pleased to allow I don't want sense; but I should be stupid to the last degree, not to prefer the honourable state of wedlock, to the condition I have lived in. I always was, and am still willing to enter into it; and doubt not my behaving well in it, having all the industry, frugality, fertility, skill and economy appertaining to a good wife's character. I defy any person to say I ever refused an offer of that sort. On the contrary, I readily consented to the only proposal of marriage that ever was made to me, which was when I was a virgin; but too easily confiding in the person's sincerity that made it, I unhappily lost my own honour by trusting to his. That very person you all know; he is now become a magistrate of this country, and I had hopes that he would have appeared this day on the bench, and have endeavoured to moderate the court in my favour; then I should have scorned to have mentioned it; but I must now complain of it as unjust and unequal, that my betrayer and undoer, the first cause of all my faults and miscarriages, if they must be deemed such, should be advanced to honour and power in the government, that punishes my misfortunes with stripes and infamy

I shall be told, 'tis likely, that were there no act of the assembly in the case, the precepts of religion are violated by my transgressions. If mine then be a religious offence, leave it to a religious punishment. You have already excluded me from the communion: is not that sufficient?—You believe I have offended heaven, and must suffer eternal fire: will not that be sufficient? What

What need is there then of your additional fines and whippings? But how can it be believed that heaven is angry at my having children, when to the little done by me towards it, God has been pleased to add his divine skill and admirable workmanship in the formation of their bodies, and crowned it by furnishing them with rational and immortal souls.

Forgive me, gentleman, if I talk a little extravagantly on these matters; I am no divine; but if you, gentlemen, must make laws, do not turn rational and useful actions into crimes by your prohibitions. But take into your wise consideration the great and growing number of bachelors in this country, many of whom, from the mean fear of the expenses of a family, have never sincerely or honourably courted a woman in their lives, and by their manner of living, leave unproduced, which is little better than murder, hundreds of their posterity to the thousandth generation. Is not this a greater offence against the publick good than mine? Compel them then, by law, either to marriage, or pay double the fine of fornication every year. What must poor young women do, whom custom has forbid to solicit men; and who cannot force themselves on husbands, when the laws take no care to provide them any; and yet severely punish them if they do their duty without them; the duty of the first and great command of nature, and of nature's God, *increase and multiply*; a duty, from the steady performance of which, nothing has been able to deter me; but for its sake I have hazarded the loss of publick esteem, and have frequently endured publick disgrace and punishment; and therefore ought, in my humble opinion, instead of a whipping, to have a statue erected to my memory.

CIRCUIT COURT OF THE UNITED STATES.

CONNECTICUT.

September, 1799.

ISAAC WILLIAMS was tried before this court on an indictment for having on the 27th of February, 1797, at Gaudaloupe, accepted from the French republick a commission and instructions to commit acts of hostility and violence against the King of Great Britain and his subjects, contrary to the twenty-first article of the treaty between the United States and Great Britain; the said Williams being then a citizen of the United States; the French republick being then at war with the King of Great Britain; and said King being then in amity with the United States. On the trial, it was admitted on the part of Williams, that he had committed the facts alleged against him in the indictment; but in his defence, he offered to prove, that in the year 1792 he received from the consul general of the French republick, a warrant appointing him third lieutenant on board the Jupiter, a French seventy-four gun ship; that pursuant to his appointment, he went on board the Jupiter, took the command to which he was appointed, which vessel soon after sailed for France, and arrived at Rochefort, in France, in the autumn of the same year. That at Rochefort he was naturalized in the various Bureaus in that place the same autumn, renouncing his allegiance to all other countries, particularly to America; and taking an oath of allegiance to the republick of France; all according to the laws of said republick; that immediately after said naturalization he was duly commissioned by the republick of France, appointing him a second lieutenant on board a French frigate, called the Charant; and that before the ratification of

the treaty of amity and commerce between the United States and Great Britain, he was duly commissioned by the French republick a second lieutenant on board a seventy-four gun ship, in the service of the said French republick; and that he has ever continued under the government of the French republick down to the present time, and most of the said time, actually resident in the dominions of the French republick; that during said period he was not resident in the United States more than six months, which was in the year 1796, when he came to this country for the purpose merely of visiting his relations and friends; that for about three years past, he has been domiciliated in the island of Gaudaloupe, within the dominions of the French republick, and has made that place his fixed habitation, without any design of again returning to the United States for permanent residence.

The attorney for the district conceded the above-mentioned statement to be true; but objected that it ought not to be admitted as evidence to the jury; because it could have no operation in law to justify the prisoner for committing the facts alleged against him in the indictment.

This question was ably argued on both sides, by the counsel for the United States, and for the prisoner.

Mr. Law, district judge, expressed doubts as to the legal operation of the evidence; and gave it as his opinion, that the evidence and the operation of the law thereon be left to the consideration of the jury.

The chief justice of the United States gave his opinion on the question nearly to the following effect:

“The common law of this country remains the same as it was before the revolution. The present question is to be decided by two great principles; one is, that all the members of civil community are bound to each other by compact; the other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community shall protect its members, and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful in its defence. This compact distinguishes our government from those which are founded in violence or fraud. It necessarily results that the

member cannot dissolve this compact, without the consent or default of the community. There has been no consent—no default. Default is not pretended. Express consent is not claimed; but it has been argued that the consent of the community is implied, by its policy—its condition—and its acts. In countries so crowded with inhabitants, that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration. But our policy is different; for our country is but scarcely settled, and we have no inhabitants to spare.

“Consent has been argued from the condition of the country; because we were in a state of peace. But though we were in peace, the war had commenced in Europe. We wished to have nothing to do with the war; but the war would have something to do with us. It has been extremely difficult for us to keep out of this war; the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our citizens from those acts which would involve us in hostilities. The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any and all times, renounce his own, and join himself to a foreign country.

“Consent has been argued, from the acts of our government, permitting the naturalization of foreigners. When a foreigner presents himself here, and proves himself to be of a good moral character, well affected to the constitution and government of the United States, and a friend to the good order and happiness of civil society, if he has resided here the time prescribed by law, we grant him the privileges of a citizen. We do not inquire what his relation is to his own country—we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and the folly are his own. But this implies no consent of the government that our own citizens should expatriate themselves.

“Therefore, it is my opinion, that these facts which the prisoner offers to prove in his defence, are totally irrelevant; they can have no operation in law; and the jury ought not be embarrassed or troubled with them; but by the constitution of the court the evidence must go to the jury.”

The cause and the evidence were accordingly committed to the jury:—The jury soon agreed on a verdict, and found the prisoner GUILTY.

The court sentenced him to pay a fine of 1000 dollars, and to suffer four months' imprisonment.

Isaac Williams was also indicted before this court, for having, on the 23d of September, 1797, in a hostile manner, with a privateer commissioned by the French Republick, attacked and captured a British ship and crew on the high seas, contrary to the 21st article of the treaty between the United States and Great Britain; said Williams being then a citizen of the United States; the French republick being then at war with the King of Great Britain, and said King being in amity with the United States.

Williams's defence on the first indictment being of no avail, and having no other defence to this, he pleaded guilty. The court sentenced him to pay a fine of 1000 dollars, and to suffer a further imprisonment of four months.

OF MARINERS.

FROM THE

ORDONNANCE DE LA MARINE,

Tome I. page 509, et suivantes.

“THE enrolment of sailors, and their distribution in classes, was one of the principal means employed by Lewis XIV to support the splendour of the marine and to render it formidable.

“This great prince conceiving that nothing could contribute more to the glory of his realm, and the prosperity of his subjects, than the re-establishment of his maritime power, his commerce and navigation, gave to it a particular attention.

“He decreed, that an enrolment of sailors should be made throughout the realm, that they should be divided into three

chases, to serve in the vessels of his majesty one year, and the two following in merchant-ships.

"At the same time that Lewis XIV invited his subjects to engage themselves in the marine, he forgot nothing on the other side to prevent their going and establishing themselves in foreign countries, as well as to recall those who had entered into foreign service."

"It was with this view that the ordonnance of August, 1662, made new prohibitions to all Frenchmen, to go and inhabit foreign countries, and likewise ordered such as were absent to return, under the penalty of confiscating and forfeiting their lives and estates."

"By the same decree it was enjoined on all those, who were in the marine of other powers to return in six months, and all Frenchmen were forbidden to serve in the marine of foreign powers under pain of death."

This extended to all cases whether France was at war or in peace, and whether the seamen served an enemy or friend.

"It was thus," says Valin, "by assiduous cares, in a short that Lewis XIV, seconded by the great Colbert, saw himself in a state to arm those formidable fleets which made those nations tremble which had before assumed the sovereignty of the seas."

"This charming order constantly pursued and maintained in the marine, has been its perpetual spring and support.

"France may experience reverses, but her maritime forces will be always the same, as long as she shall find in the multitude of her officers and sailors the same facility to form good crews."

"The sailors are so bound by their enrolment, that they cannot change their condition or abode without declaring it to the commissary of their department, nor can they be engaged even by Frenchmen in their merchant-ships, without the permission of the commissary, under pain of being treated as deserters."

The same author, page 556, adds,

"It is forbidden to engage any sailor for foreign service within the realm, and to all our sailors to engage in such service without our permission, under pain of exemplary punishment."

"It is in the same manner forbidden to every Frenchman to go out of the realm to engage in foreign service, or into the dominion of any foreign prince, without permission of the King."

The article 29th of the Ordonnance of 1680, directs, "That all carpenters, cannoneers, officers, mariners and sailors who shall go out of the realm to enter into the service of other nations, or who shall establish themselves in foreign countries, or shall fix their domicil there by marriage or otherwise, shall be punished as deserters."

"As to the prohibition" of raising sailors or soldiers in the realm for foreign service, it proceeds from the right of all nations, from the interest which every sovereign has to preserve his subjects.—Thus by the code of the Visigoths, it was forbidden to all strangers to take their subjects under a penalty of one hundred lashes and an amend in gold."

DISTRICT COURT.

ORLEANS.

Friday, April 20th, 1810.

Present the honourable DOMINICK AUGUSTIN HALL.

THE inquiry of yesterday was of the most unpleasant nature. A high officer of the United States defending himself against a charge of corruption, is a most interesting spectacle. To me it has been a most distressful scene. To sit in judgment on one who has been intrusted by the government with some of its most important interests, is a most painful duty; but to be compelled to do so on an officer whose relations with the court are so very intimate, whose mutual respect and confidence are so very necessary, is peculiarly painful indeed.

Reports unfavourable to the reputation of the district-attorney, having been for some time circulated, it was deemed proper by his friends to communicate them to him—in consequence of which Mr. Grymes has requested that an inquiry into his conduct should be made by the court.

It appears that before a decree was pronounced in the case of the Franchise, on the suggestion that the cargo of that vessel was in a perishable state and stored at a great expense, it was agreed by the district-attorney and the counsel for the claimants, that the cargo should be sold at a credit of sixty days. Mr. R. D. Shepherd became a purchaser to a considerable amount. It is stated by Shepherd in his testimony, that some days before his note given for a part of the cargo became due, several gentlemen were standing in the street near his house. The conversation turned upon the scarcity of money and the payment of his note. Mr. Shepherd said it would be a very good thing if he could get his note renewed.

Mr. Grymes thought the thing could be done. Mr. Shepherd desired Mr. Grymes to inquire whether he could effect it, and if so, he would pay a commission. Mr. Grymes said that he would try and get it renewed for six months. Shepherd said if he could, he would pay four per cent.

Afterwards Mr. Grymes obtained the consent of Mr. Moreau, counsel for the claimants, to renew the note. He told Mr. Moreau that he would much oblige himself and his friend Mr. Shepherd, by prevailing on Mr. Chevalier to consent to a renewal for four months. In the latter end of March, he showed to Shepherd an agreement between Moreau and himself, which was placed in the hands of the marshal. The note was renewed with John M'Donough and David Olivier endorsers. Mr. Grymes claimed and received from Mr. Shepherd four per cent. on the whole amount of the note.

Mr. J. L. B. Duplessis, was present at the conversation in the street between Mr. Grymes and Mr. Shepherd. He differs from Mr. Shepherd in one point. He says that several gentlemen were conversing on the subject of the Franchise and her cargo. Mr. Grymes came up—Shepherd said he had a note to pay for a part of that cargo—Mr. Grymes observed, that if he, Shepherd, would give him a handsome fee, he would get the note re-

newed. He thinks Mr Grymes mentioned five hundred dollars as the fee. Shepherd communicated his arrangement with Mr. Grymes to Mr Desforgues, the French consul. The consul told it to Mr. James Brown, and afterwards to Mr. Duncan. He also imparted to Mr. Brown, Mr. Grymes's transaction with Guillote, which I do not think by any means calls for the censure of the court.

But how stands the affair with Shepherd? The attorney of the United States, a high important officer, entering into compromises, and making a job of monies ordered to be deposited in the Bank of the United States! Descending from his high dignity, and bartering his official influence for a few hundred dollars! Had he been alone moved by the mild influence of friendly attachments, there might be some excuse. But it appears, and it is with pain I utter it, that he was governed in this transaction by motives of a very different nature. What hurried him to Mr. Moreau, but the hope of his reward? Why press him to oblige himself and his friend Shepherd, by renewing the note, but the expectation of his four per cent.? Why send the marshal to obtain the consent of the judge, and pray him to make an order to sanction the transaction? His desire to possess the four or five hundred dollars. And here let me observe that conduct of this sort may lead courts of justice to be the instruments of fraud and of the vilest practices.

Nothing is better known than that the courts of justice, are in the practice, and with propriety too, of placing the utmost confidence in the opinions, and assenting to almost any agreement that may be made with an attorney-general or a district-attorney, with respect to those matters with which they are particularly intrusted by the government—Hence it is that a court seldom considers a subject in which the government is interested, when the attorney-general says he is satisfied: hence Judge Johnston, in the celebrated mandamus case, in South Carolina, says he could offer the silence of the district-attorney, when called upon to say whether he should make any opposition to the motion, as an apology for the court, if any had been necessary. But if officers of this high standing will leave their dignified stations to become the brokers and agents of individuals, avail themselves of their official situation, and receive money for their

official consent—a court, believing them to act solely from pure motives, and an exclusive devotedness to the interests of their country, being thus deceived, may at some instant become the instrument of injuring its best interests, and inflicting the severest wound on its character.

But Mr. Grymes has alleged that the interests of the United States have not suffered—that at all events the money could not be demanded until the determination of the appeal. In my mind this is no apology for him. The sacred purity of our courts of justice, the boast and pride of our country, is deeply stained, if, for a moment, it can be believed, that their officers can be turned, by the means of money, into pliant tools of every designing, speculating merchant.

Mr. Grymes says he was anxious to have the Franchisee bonded, because she was at a considerable expense, having reason to believe the sentiments of the judge were favourable to a delivery of the proceeds of the cargo to the claimants, on their giving security to refund in case of a reversal of the decree. If Mr. Grymes, under that impression, had assented to an arrangement of that sort, no censure could be attached. But his fault was, to receive money from Shepherd, for the purpose of extending a credit to him, and to attempt to make this court the means of his acquiring unlawful gain.

This transaction is attempted to be defended, on the ground of its publicity. It is said it took place in the streets. My only surprise is, that all who heard the conversation were not astonished and confounded; and the only apology I can conceive for them is, that they could not believe that the parties were serious.

It appears, indeed, that at some unlucky moment, Mr. Shepherd did disclose his bargain with Mr. Grymes; but there is not the slightest evidence to show that Mr. Grymes ever imparted to any one of his most intimate friends, to Mr. Moreau, or to any body else, that he had received a single shilling from Shepherd. I must also observe, that even Mr. Shepherd seems to have repented of his disclosure. When he was before me on Tuesday, although particularly questioned as to this transaction, and of the conversation that passed between him and Desforgues, he only said, that he had told Mr. Desforgues, that he had paid

bank interest for the amount of his note—he did not say that he had agreed to pay, or had paid, to Mr. Grymes any sum of money, until Mr. Grymes acknowledged it himself.

Mr. Grymes has appealed to his correct conduct in many instances in this court, to show that it is not probable that he could have been actuated by improper motives in this affair. It is true that Mr. Grymes has, on many occasions, in the performance of his official duties, displayed a zeal for publick interests that did him much honour—it gives me great pleasure that I can declare that I consider his exertions those of a faithful officer. It appears that in several instances he has been kind, indulgent and accommodating, without any expectation of reward, and, in the instance of Mr. Kenner, refused money when offered—I wish the transaction of the day he saw Shepherd, could be blotted out of the history of his life, it is one that I cannot approve, but on the contrary must unequivocally condemn. Mr. Grymes may consider these observations as somewhat harsh: I lament the occasion that has produced them. They are the sentiments of one who is moved at this moment by no passion or ill will; who having been for some years engaged in administering justice, knows full well the value of unsullied reputation, how all-important the character of purity and incorruptibility is to the ministers of the law, and that a contrary impression on the mind of the community must be productive of contempt of laws, abhorrence to our officers, and finally end in the destruction of our admirable institutions. It is with much pain I pronounce the result of the inquiry, which is, that Mr. Grymes, has incurred the censure of this court, and he is censured accordingly.

I do hereby certify the above to be a true copy from the original now on file in the clerk's office of the District Court. *In testimony whereof*, I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, this 12th day of July, in the year of our Lord, 1810, and in the 35th year of American independence.

THOMAS S. KENNEDY, *clerk*.

THE ADVERSARIA.

THE frequent quarrels that arise among them (*the Germans*) when intoxicated, terminate not so often in abusive language, as in blood and slaughter. In their feasts, they generally deliberate on the reconciliation of enemies, on family alliances, on the appointment of chiefs, and finally on peace and war; conceiving, that at no time the soul is more opened to sincerity, or warmed to heroism. These people, naturally void of artifice or disguise, disclose the most secret emotions of their hearts in the freedom of festivity. The minds of all being thus displayed without reserve, the subjects of their deliberation are again canvassed the next day; and each time has its advantage. They consult when unable to dissemble; they determine when not liable to mistake. TACIT. de Mor. Germ. c. 22.

The deliberating on business, and the holding of councils of state during entertainment, was the practice of the Celtick and Gothick nations. And, it is remarkable that the word *mallum* or *mallus*, which, during the middle ages, denoted the national assembly, as well as the *County Court* is a derivative from *mael*, which signifies *convivium*.

From this union of festivity and business, there resulted evils which gave occasion to regulations which cannot be read without wonder. It was a law of the Longobards, "Ut nullus ebrius suam causam in mallum possit conquirere, nec testimonium dicere; nec comes placitum habeat nisi jejunos." LL. Longobard. lib. 2. tit. 52. l. xi.—No drunken man shall be at liberty to plead his own cause, nor to give evidence in a court of justice; nor shall the magistrate give judgment unless fasting.

We read in *Capit Kar. et Lud.* "Rectum et honestum videtur ut judices jejuni causas audiant et decernant."—It seems fair and honest that judges should be fasting when they hear and determine causes. Lib. 1. l. 62. ap. Lindenbrog. And the following law was made in a synod held at Winchester, ann. 1308. "Item, quia in personis ebriis legitimus dici non debet consensus, inhibemus, ne in tabernis per quaecunque verba, aut nisi jejuna saliva.

vir, aut mulier de contrahendo matrimonio sibi invicem fidem dare præsumant. 2. *Wilkins, Concil.* p. 295.—Because persons when drunk, are incapable of giving a legal consent, we forbid, that a man and woman attempt to pledge themselves in a contract of matrimony, when in a tavern by any form of words, unless with a *fasting spittle*.

This rudeness, of which we see the source in Tacitus, seems to have continued very long in England. “Non exolevit hactenus mos antiquis,” &c. says Sir HENRY SPELMAN, in *Gloss.* p. 385. The ancient custom has not yet ceased in the courts which are called assizes for the sheriffs of the county to expend a large sum of money twice a year in feasting the judges and gentry of the country.

From this propensity of the older Britons, has proceeded the restriction upon jurors, to refrain from meat and drink, and to be even held in custody, until they had agreed upon their verdict.

LAW ANECDOTE.

In the year 1792, Timothy Oates, publick crier of the court in Wiltshire, presented the following petition:—

“To the honourable judges of the court in and for the county of Wilts: the petition of Timothy Oates, publick crier of said court, humbly sheweth:—

That your petitioner is this day eighty-four years of age, and was a crier in this court before either of your honours were born. That, small as his perquisites are, his wants are still smaller. He, alas! can cry no longer: but he may possibly *live* a little longer: and during that small period he implores to *cry* by proxy. His son Jonathan has a sonorous echoing voice, capable of rousing a sleeping juror or witness in the remotest nook of the court-house. Your petitioner begs that Jonathan may be accepted as his substitute; so that of your petitioner it may be said when he is dead and gone, that although he *cried* almost all the days of his life, yet he never shed a *tear*.”

The bench granted, *nem. con*

RHODE ISLAND.

ON the 4th of February 1813, a novel and highly interesting question was argued before the District Court of the United States, holden by his honour Judge HOWELL, in the case of a libel against the ship *Aurora*, of Newburyport, prize to the privateer Governour Tompkins, of New York, found sailing under a British license. The principal documents produced on the part of libellants were—a consular copy of a letter from Admiral Sawyer, commanding on the Halifax station, referring to a previous correspondence between the admiral and Andrew Allen, jr. British consul at Boston, on the subject of supplies from America, reciting the necessity and policy of maintaining a constant supply of provisions from America to the British West India Islands, with assurances to the consul, that his majesty's vessels of war would be directed to permit to pass and fully to protect all American vessels so laden and bound, and which should have on board the pass or license of the consul, with a copy of the admiral's letter authenticated by the consul; also, a pass signed by the consul at Boston, with such authenticated copy annexed;

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also, a pass of the consul from Newburyport to Norfolk, the port where the Aurora was to take in her cargo for the West Indies. The official papers explicitly stated the intention to be, a supply of the British West India Islands, although the ship's papers purported a voyage to a neutral port. There was some other matter connected with this cause, but the above evidence founded the point most interesting to the community. We present a statement of the case, more from the magnitude of the legal question, than a wish to make it the subject of mere party discussion; but at the same time we think it a duty incumbent on every American, most pointedly to reprobate a practice, so manifestly criminal and injurious to the country.

In the opening of the case, JOHN WOODWARD, Esq. a distinguished counsellor from the city of New York, occupied nearly eight hours in a series of the most cogent and connected arguments, during no moment of which period was the attention of the court or audience suspended. What peculiarly distinguished this gentleman's reasoning was, that he urged no position or doctrines which he did not support by the production of some principle of the law of nations, or some decision founded on that law. It cannot be expected that we should, from memory, precisely state the whole of Mr. W's very ingenious and truly legal disquisition, which extorted the most respectful approbation of the bench, and the admiration of the auditory. As a preliminary ground, he clearly established, that the statutory forfeitures of Congress had no bearing on the case, excepting so far forth as a binding municipal regulation was auxiliary to the provisions of international law. His main proposition was, "the obtaining from an authorized agent of Great Britain, paying for sailing under, and exhibiting on the high seas, as protection for the voyage, a British license of pass and trade, by an American citizen, without the permission of his own government, the two countries being at war, are in themselves cause of capture and condemnation, as prize of war." To support this proposition, a variety of grounds were taken, among which were—That licenses were factitious, and not a part of the law of nations; but the creatures 1 of prerogative, and that confined to municipal regulation, or 2 of compact, or 3 of parliamentary provision: that the licenses in question were against the nature and law of war, as they put it in the

power of particular individuals to relax or abate the rigour of the war; against the obligation of allegiance; and that the stipulations of such licenses could not be enforced by any known law. That the obtention and possession of those licenses to pass and supply, and the sailing under them, knowing of the war, was a *trading* with the enemy, independent of the port of destination and of the right of property which may be the subject of trade: that the case of a license to trade to a citizen or subject from his own sovereign, was distinct from that of a license to a citizen or subject of one of the belligerents from the enemy, without the sanction of his own government; and so would be the supposed case of the neutral, for no question like the present could arise between the neutral citizen or subject and his own nation, as that nation would not be a party to the war; and the description of rights here involved would not in that case be in question.

"The question," said Mr. Woodward, "whether the property be American or British, matters not, provided the indirect or direct trading with the enemy be established. If you use your property so as commercially to benefit and carry into effect the *prescribed and stipulated commercial views* of the enemy, and under a *formal license of protection or supply*, this is as much *trading with* the enemy, as if the subject of the trade were the property of the enemy, and the destination an enemy port. In the latter case you trade *direct*—in the former *indirect*. If a different doctrine prevailed, national right would be sacrificed at the shrine of the meanest artifice." "But," continued Mr. W. "if you *pay* the enemy, for such license, the case is still stronger, as the transit of the medium of commerce stamps a commercial character upon the transaction, and in this light alone converts it into a supply." "As to the locality in the inception of this transaction," Mr. W. said, "it is the known legal rule of construction, that the deleterious character is communicated to the ship, the cargo, and the voyage, for which the transaction is intended to provide, and which are described on the face of the licenses."

In the close of this very able and luminous brief, Mr. Woodward observed, "much, as to the interpretation and application of the rules of the law of nations, will depend upon the *character*

of the war in which we are engaged. The war of the United States with Great Britain he proceeded is a war between two maritime and commercial nations, in support of an independent commerce. The rules of decision which have applied the law of nations *to the conduct of the citizens of each belligerent*, have always been so construed and applied as to effectuate the notorious reasons and policy of the war. This is not a theory, but has been emphatically pronounced by the decisions to which I have referred; and it will be found by those decisions, that the principles of the law of nations have always been, *under legal discretion*, restrained or enlarged so as to effectuate and not intercept the notorious and avowed policy of the war. And more particularly has this principle been enforced upon questions arising upon the conduct of a citizen of one of the belligerents with his own nation: which is the present case.—To trade with or hold a commercial intercourse, whether by person or property, with the enemy, without the license of one's own government, is proven, by all the writers upon the law of nations, and all decisions touching this point, as adverse to the policy of a war waged for the purpose of commerce—that it amounts to a misdemeanour, and is cause of confiscation and condemnation. Suppose our citizens be permitted thus to obtain, pay for, and act upon these licences: they would be in the practice of all the evils and derangements which the law of war is intended to prevent. They would facilitate treacherous correspondence, information and supplies to the enemy—the very evils assigned for the prohibition of *all commercial intercourse*; or, in the language of Sir William Scott, in the case of the *Jonge Pieter*, “all communication, direct or indirect, without the license of government,” with the enemy. The anomaly of a citizen at peace and his nation at war, would emphatically exist: nay—the absurdity of that citizen making his peace and his fortune by the disposition of the enemy, obtained adversely to that of his own government. It is also easy to perceive, that by these licenses it would be in the power of the enemy to destroy or counteract the internal commercial policy, and relations of the states, or politically to distract the union, by concentrating the trade into some particular state, or casting it into the hands of a particular party. It is the language of a finished civilian,

that "there is no such thing as a war for arms and a peace for commerce."

"If we silently permit our citizens to traverse the ocean under such licenses of pass and supply from the enemy, (Mr. W. added) it has been already proven, that by the basest collusion between American citizens and the British government, we enable the enemy to take by stealth a portion of our national sovereignty, and if this high principle of national honour thus *bear the touch*, it would be better to surrender the whole. In a commercial war, which is always preventive and restrictive, by such licenses of pass and supply, the enemy would assume the right of regulating the commerce and directing the capital of our own citizens. The independence and integrity of one of the belligerents would be lost in the independence and prospects of its citizens or subjects upon the authority or courtesy of the other. The civic relation, the national pride, and the boasted morals of our countrymen would be corrupted or destroyed by the deleterious influence of foreign gain; and that distinguishing and repellant point of character which marks the American citizen, both at home and abroad, and which now stamps our national character upon the fears and the admiration of the world, would be found at the feet of our enemy or lost in the mazes of British corruption."

This cause commenced on Thursday and continued until Monday afternoon, when the attorney-general Burrill, and Mr. Boss of Newport, as counsel for the claimants, Clark and Wheelwright of Newburyport, having closed a very elaborate and ingenious argument on their part, Mr. Robins, United States' district-attorney, was about commencing what we have no doubt would have been a finishing plea in behalf of the libellants, when the court superseded an argument on his part, by pronouncing a very strong and able judgment, condemning the ship and cargo to the captors. It was remarked that the judges' opinions were in complete coincidence with the doctrines and arguments so powerfully enforced.

CIRCUIT COURT OF THE UNITED STATES.

NORTH CAROLINA.

The United States On behalf and for the use of the owners, officers, and crew, of the private armed ship General Armstrong, whereof John Simclair was master and commander,

versus

The schooner Matilda and her cargo, Thomas Jerkins, master.

This was a libel in the Admiralty, seeking the condemnation of the Matilda and her cargo as lawful prize; and was filed and heard in the District Court at Wilmington, at May term, 1813.

The libel charges among other things that the schooner Matilda, being a vessel of the United States and belonging to citizens thereof, did depart from the port of Newbern since the 11th of March last, with a cargo of shingles, scantling, and corn, bound for some British port in the West Indies, to wit, some port in Antigua, Montserrat, St. Christophers, Nevis, or the Virgin Islands, with an intention on the part of the master and owners of disposing of the cargo to the inhabitants (being British subjects) of some of said islands. That on the 5th of April, 1813, (the day of capture) in lat. 26 deg. 39 min. north, long. 68 deg. 17 min. west, the Matilda was sailing under a British license which authorized the importation of said cargo from the United States into the said British Islands.

A claim and answer was put in by Thomas Jerkins, the master, and one third owner of the schooner and cargo, and by Moses Jarvis, for himself and his partner Sylvester Brown, owners of the other two thirds, all citizens of the United States. They

state among other things, that the schooner and cargo were seized about the 5th of April, 1813, by the Gen. Armstrong, on the high seas, while said schooner was proceeding from the port of Newbern, N. Carolina, to the island of St. Bartholomews, in the West Indies; that she was regularly cleared for said voyage; that they, the claimants, had given bond, according to law, that she should not proceed to an enemy's port; that she was at the time of seizure, in the direct course to St. Bartholomews; that they, the claimants, had no intention of proceeding to an enemy's port; or of having any commercial intercourse with the enemies of their country; that said claimants had coffee lying at St. Bartholomews, which they were desirous to bring home, and which partly induced the prosecution of said voyage; that the schooner was boarded and taken by the crew of the ship, and the master, Thomas Jerkins, ordered on board the ship, the said crew being in possession at that time of no other papers from the Matilda, as claimants know of, than the regular documents of the vessel and a letter from Jarvis and Brown to Jerkins; that on the 5th day after the capture, two men opened Jerkins's trunk, and having searched his pocket-book, found therein two papers, commonly known as British licenses, which were procured by Jarvis and Brown, from American citizens, and were intended to protect the Matilda from British cruisers on her said voyage to St. Bartholomews; that at the time of capture, the seamen of the General Armstrong were in a state of revolt, mutiny and rebellion, the captain of said ship being confined to his cabin and his authority usurped— and they submit whether a capture thus made can be good prize. To this claim and answer, is annexed the affidavit of the claimants Jarvis and Jerkins, declaring the facts to be true.

The evidence was in substance as follows:—A license signed by H. Elliott, governour of the British leeward Charibee Islands, at Antigua, the 22d of January, 1813, to be in force from the date thereof to the 30th June next. This license expresses to be issued by virtue of an order in council, of October 26, 1812. It is granted to Daniel Multhroe, and permits a vessel being unarmed, and not less than one hundred tons burthen, and bearing any flag except that of France, &c. to import into any of the ports of Antigua, Montserat, St. Christophers, Nevis. and the Virgin

Islands, from any port of the United States, a cargo of stores and lumber, live stock, &c. and every kind of provisions whatsoever, beef, pork, butter, salted, dried and pickled fish excepted, without molestation, on account of hostilities existing between his majesty and the United States, notwithstanding the said ship and cargo may be the property of any citizen or inhabitant of said states, &c. and that the master of said vessel shall be permitted to receive his freight and return with his vessel and crew to any port of the United States not blockaded, with a cargo consisting of rum and molasses, and of any other goods and commodities whatsoever, except sugar, indigo, cotton, wool, coffee and cocoa; upon condition that the name and tonnage of the vessel, and the name of the master shall be indorsed on the license at the time of the vessel's clearance from the port of landing. This license was indorsed in the following words by the claimant Jarvis, viz. "Thomas Jerkins, master of the schooner Matilda burthen 114, 82-95 tons, with a cargo of scantling, shingles, corn, and necessary stores, Newbern, North Carolina, March, 11th, 1813."

Another license, agreeing in all respects with the last mentioned, except that this gives permission, in addition to the former, to touch at St. Bartholomews on the outward and homeward voyage to and from the British Islands. This is not endorsed, but both bear No. 46, and are intended probably as a set of licenses. A letter from Jarvis and Brown, written at Newbern, March 11th, 1813, addressed to Thomas Jerkins at Wallace's Channel, states, that since writing the letter which covers the bills of lading, the mail brought the news of the adjournment of Congress, and that the Senate had put a death-wound on the license bill, and the bill to prohibit the neutral trade was also killed by the same house, so that we are now in the same situation with respect to commerce as we were before the session commenced. As the non-importation law is still in force, should you think of returning with produce, you will guard against your own government."

The Matilda had a regular clearance from Newbern, bound for St. Bartholomews, dated 11th March, 1813.

The bill of lading at Newbern, written by said Jarvis, agrees with the cargo before stated, and bears even date with the clearance; but in the bill of lading the vessel is said to be "bound for

the West Indies." The list of seamen was regular, and so was the register.

The President's commission to the General Armstrong is in the usual form, and of date, the 23d November, 1812. The ship is therein stated to belong to John Everingham and John Sinclair; and authority is given to John Sinclair, captain, and David Pearce, lieutenant, of said ship, and the officers and crew thereof, to subdue and take any British vessel, &c. and the said John Sinclair is further authorized to detain, seize and take all vessels and effects, to whomsoever belonging, which shall be liable according to the law of nations and the rights of the United States as a power at war, and to bring the same into some port of the United States, in order that due proceedings may be had thereon.

William Livingston, a witness for the libellants, swore, that on the 5th of April last, the Matilda was brought to by the General Armstrong; that Jerkins was ordered on board the ship, and his papers demanded; upon which he delivered the register, clearance, bill of lading, and list of seamen aforesaid—that he, the witness, being then sailing master of the ship, declared he would send the schooner into port; to which Jerkins replied, that he had not seen all his papers, and pulling two more out of his pocket gave them to this witness, which proved to be the endorsed license, and the letter from Jarvis and Brown to Jerkins as aforesaid—that a few days after he searched Jerkins's trunk, and found therein the endorsed license aforesaid—and that he commanded the ship at the time of said seizure. Upon his cross-examination, he declared that Captain Sinclair was confined to his cabin by some part of the crew as he understood; that it is not common for the sailing-master to have command of the ship, when the captain is on board—that Sinclair, Everingham, and others, were owners of the ship—that Captain Sinclair authorized him to act as sailing-master—that Sinclair did not seize, or assent to the seizure of the Matilda.

James Johnston, another witness for the libellants, deposed that the General Armstrong arrived at the port of Wilmington on the 16th of April, and the Matilda on the 19th—that captain Sinclair put him on board the Matilda, in the port of Wilmington, to take an inventory of the effects, and to dispossess the mu-

tineers—that he was first lieutenant of the ship, and held possession of the schooner under the authority of Captain Sinclair—and upon his cross-examination said, at the time of the capture, Captain Sinclair was confined in his cabin, and that he, the witness, was confined in the ward-room with liberty to go on deck, but to have no communication with the crew—when Jerkins came on board, he, the witness, was ordered out of the ward-room on the fore-castle, by William Livingston, sailing-master, and then commander, but was not to communicate to Jerkins the state the ship was then in—that on the 18th March, while the captain and he were together in the cabin, the doors were shut on them, and they confined by the master's mate and others of the crew—he saw Jerkins's trunk after it was open, heard that they had gotten another license, but did not see it.

Charles A. Lewis, also sworn on behalf of the libellants, declares that at the time the *Matilda* was brought to, the General Armstrong was under British colours—he was in the ward-room of the ship when Jerkins came on board—heard Livingston ask him for his papers—saw Jerkins deliver some papers to Livingston—and upon the threat of the latter to send the schooner into port, Jerkins seemed confused, and said “I have more papers that you have not seen,” and took out of his pocket and delivered to Livingston the endorsed license and the letter aforesaid.

Captain John Sinclair, a witness for the claimants, deposed, that on the 18th March, he was dispossessed of the command of the ship by William Livingston and other officers and crew—that Livingston, who was then under arrest for misdemeanor, took the command of the ship the same night, without authority from *him*, and continued in command until after the capture—and that the capture was made without his privity or consent; he was the commander and part owner of the ship; he delegated power to Everingham to do in the subject of the capture as he might think proper, as agent for the owners, and the said agent has carried on the proceedings—that he would not from his knowledge of the general character of Livingston, believe him on oath—he appointed Livingston sailing-master when he first came on board, and continued him in that command until the 22d February, when he arrested him for disobedience of orders—that he put an officer on board the *Matilda* to devert those of

the command who had captured her without his privity or consent, and to keep possession of her on account of the ship, until it should be determined to whom she might of right appertain.

The two licenses and the letter were delivered to the collector of the port of Wilmington, previous to the arrival of the *Matilda*.

Upon this evidence it was argued for the libellants, that the overt act of sailing under a British license was evidence of trading with the enemy according to the tenour of the license; and that the trading with the enemy was an act, for which, by national law, the vessel and cargo so taken *in delicto* were confiscable, and Vattel was relied upon as furnishing the rule of decision in cases of such trading. It was further contended, that the law of nations, prohibiting intercourse and dealing with an enemy, is not abrogated by the act of Congress on the subject of licenses, as was decided in Pennsylvania by Judge Peters, in the case of the *Tulip*.

For the claimants it was argued, that there has been no act committed; no trading with the enemy, nor any other act violating the rules of general publick law: For at most, the evidence proves nothing more than an *intention* to proceed to an enemy's port; and it is contrary to every principle of law and justice to punish a man for his imaginations. The *Matilda* was in the road to St. Bartholomews, and had not so much as deviated from her course, so as to lay the foundation for the inference that her real destination was an enemy's port. (Term R. 85. Park on Ins. 114) But it was not, in fact, the intention of Jerkins to proceed to a British port—his real destination was St. Bartholomews, as declared by the claimants on oath. No evidence has been adduced to repel this positive declaration, except the feeble presumption arising from the mere possession of the license; which is completely answered by the rule, that every man is presumed to be innocent until the contrary appear. It was also contended, that the mutiny of the crew disabled them from making lawful capture, and rendered them obnoxious to a law which affixes the punishment of death to such an offence, and as the commissioned officers were divested of their command by force and wrong, their assent to the capture could not be presumed; nay the contrary was expressly proved.

The argument being closed, and the object of counsel having been stated to be that of obtaining an immediate decision of this court, and of taking the case thence by appeal to the Circuit Court, so as to have a hearing at the ensuing term, the judge proceeded to deliver his opinion. He remarked on the novelty and importance of the question—that it was important not only as to the amount of property at stake, but was of vast importance in principle and consequences. He glanced at the difficulties he felt in deciding some of the points in the cause without the aid of authorities or of time to reflect. For these reasons he approached the case not without some distrust of his own judgment; but felt much relief from the assurance that the case would undergo an investigation in a superior tribunal; for this reason he thought it not very material how he should decide.—He felt it his duty, however, as the case had been argued, to meet the question, and briefly to state the reasons which occurred at the moment to influence his decision. As to the objection that the act of trading was not complete, he had no hesitation in saying that, according to the current of decisions, particularly in cases of blockade, where the principle is the same, the offence was complete, if the real destination was an enemy port; for this is not the case of a mere *will or intention* to proceed to such port, which, without some overt act would not be punishable: but there was an actual sailing and proceeding on the voyage, thereby carrying that intention into effect; and the point at which the vessel was arrested, affords no grounds unfavourable to the presumption that she was bound to one of the British licensed ports; because she was in the road as direct for one of those as for the neutral port. The question of fact then is this:—Was the *Matilda* really bound to a British port with a cargo? The judge felt himself bound by the evidence to say that she was: according to the well known rules in the Court of Admiralty, that where a suspicion of guilt is created by the possession of documents, it is expected that the possessor will explain away such suspicion by proof; and where such suspicion is applicable to the charge in the libel, it is *prima facie* evidence of the facts contained in the allegation, and casts the burden of proof on the party charged. Now, he remarked, the possession of the licenses and the letter of advice, unexplained by evidence, is proof to my

mind that the vessel was prosecuting the voyage she was permitted to do by the license. It is true the American papers were all regular, and so they must have been to obtain a clearance. Nothing should be inferred from thence, because every man, whether his designs be honest or otherwise, would use the same precaution; and no man would furnish evidence against himself in a way not at all necessary to the execution of his unlawful designs. The British cruisers know that vessels of the United States must conform to our municipal regulations ere they are permitted to depart. As to the letter, it bears evidence of some unlawful purpose—for if the real object was a lawful trade, it is difficult to assign a reason for the additional caution, “guard against your own government.” The captain was already apprized of the failure of the license bill, and of the existence of the non-importation act. The object, indeed, might be to import British produce from a neutral port—which, though unlawful, does not fall under the present charge; or, it might be to import from a British port, and to touch at St. Bartholomews, and there obtain a neutral clearance, so as to guard against this government. The latter supposition very well accords with the licenses.

Upon the question of law, whether the act of Congress of the 6th July last, upon the subject now under consideration, is cumulative on the prohibitions of international law, or whether it operates as a repeal or abrogation of those prohibitions; the judge expressed much doubt, but yielded to the opinion which had been given by Judge Peters in the case of the *Tulip*, *that the act of Congress is but cumulative*.

The only remaining point to be noticed, said the judge, is one of great importance, and, to the court, of serious difficulty; because I entertain much doubt on it, and have not the aid of books in forming my opinion; it is the question which grows out of the mutiny of the crew of the privateer. From what has been said, it would seem that the schooner and her cargo are confiscable; but it does not necessarily follow that because the property is forfeitable to the United States, the libellants shall take the benefit of such forfeiture.

The President's commission was the authority under which the capture was made; this commission authorizes *John Sin-*

clair the captain, to seize, &c. but the evidence is that the captain, at the time of capture, was, by the violence of the crew, put in close confinement and deprived of all command and authority over the ship. As, therefore, the authority was usurped by others, and the vessel navigated against the will of the captain, all acts done by the crew during such usurpation must be presumed to have been done against his will; or, at any rate, not with his assent either express or implied. The libel is filed in the name of the United States for the use of the owners, officers and crew of the ship. Had it been in the name of the crew only, according to the truth of the case, the objection then would have been, that you have departed from the commission, which was their authority to seize. And taking the case as it stands, it appears a little awkward for the United States to sanction an act that necessarily springs from another which they have said, by the legislature, shall be punished with death. The crew in a state of mutiny made the capture: mutiny is punished with death. And is it competent for the captain to contradict the fact, and now allege that he made the capture, or that it was made by his assent? Or shall he now give a right to himself by relation, and make valid that which was unlawful at the time? The court inclines to a negative answer. What vests the right in the captors? Surely the prize-act—and there it will be seen the right is vested in the owners, officers and crew of the vessel by whom the capture is made.

Upon this point, the court adjudged that the evidence did not support the allegation, and therefore dismissed the libel; but did not decree the restoration of the property. An appeal was immediately obtained and the case brought up to the Circuit Court at this place, where it was argued at considerable length, at the last term, before the chief-justice of the United States, and two points were made, 1st. Was the *Matilda* bound to an enemy port? 2d. Did the conduct of the crew of the ship affect the right of the libellants in the present proceeding? It was conceded that if the *Matilda* was really bound to a British port, the offence was complete. But it was contended that there was no evidence of such fact, except a vague inference to be deduced from the mere possession of the license; for as to the witnesses, it was said, they were interested in the distribution of

prise, and therefore incompetent. 4 Rob. Rep. 68, 5 Rob. Rep. 307. That the presumption such as it was, in favour of the libellants, was answered by the positive oath of Captain Jerkins, who was a competent witness; and that the licenses were intended as a fraud upon the enemy; a practice which is always permitted.

Upon the second point the counsel for the claimants relied upon, 2d Rutherford's Inst. 564. 3 Rob. Rep. 160—184, Marten's—2 Azunia 354—362 and Bro. C. and Ad. law 461.

The counsel for the libellants took a survey of the evidence, and endeavoured to show by fair inference the unlawful purpose of the claimants. He admitted that the claim and answer as sworn to by Captain Jerkins should be taken as though the captain had been examined on interrogatories. Upon the second point he introduced and relied upon as conclusive authorities, Brown's C. and Ad. law. 281—2, 453 and 8 Term Rep. 224.

The chief-justice asked if Captain Jerkins was a competent witness, and being answered by the libellant's counsel that he was, he was clearly of opinion that the charge against the schooner had no foundation. He remarked upon the regularity of the ordinary papers—he thought the letter of advice contained no evidence of criminal intent, but rather the contrary. He stated the question to be, whether the claimants intended a voyage to an enemy port or not. But he saw no evidence of such intention, save that of the license: that it was common and not at all improper to carry papers to deceive the enemy; that the carrying of the license was to enable them to prosecute a voyage to a neutral port under the protection of the license; and that the evidence of Captain Jerkins cleared the case of all doubt by stating the real object, and positively denying the inference drawn from the license. Here the libellants' counsel called the attention of the chief-justice to the fact, that Jerkins was part owner of the schooner and her cargo, a circumstance not recollected when the concession was made. The chief-justice immediately replied that he was interested and of course incompetent. The counsel for the claimants then argued, that this answer should be received as an answer in Chancery is: and if so, the answer is to be taken as true until it be disproved. The chief-justice admitted the rule in the Court of Chancery, as to the negative matter of an answer, but not in a case where it asserts a

right affirmatively in opposition to the complainant's demand : but he took this distinction between a case in Chancery and a case in Admiralty : in the former, the complainant calls upon the defendant to purge his conscience and disclose facts ; and by this appeal to his conscience the complainant makes the answer evidence : in the latter case no such demand or appeal is made.

The chief-justice then said that the case was very different from what he conceived of it under the evidence of Jerkins ; and expressed a willingness to let it lie over for further proof if the libellants had a prospect of obtaining any ; but being told they had not, he said he was still of the same opinion ; and affirmed the decree of the District Court. He also decreed the restoration of the property, but without damages.

He gave no opinion upon the second point.

DISTRICT COURT OF THE UNITED STATES.

DELAWARE.

The United States of America, *v.* the ship Good Friends, her tackle, apparel and furniture.

Information filed May 5, 1812.

FISHER, JUSTICE.—The ship Good Friends, Robert Thompson master, owned and claimed by Stephen Girard, merchant, of Philadelphia, registered on the 9th of March, 1804, laden with flour and carrying a sea-letter dated 27th of July, 1811, sailed from the capes of Delaware on the 1st of August, 1811, was bound for the port of Lisbon, in the kingdom of Portugal, and

a market. She arrived on the 30th of August at Lisbon, and discharged and sold her flour agreeably to instructions. She left Lisbon after the sale of her outward cargo about the last of September. The supercargo landed in England on the 10th of October: ten days afterwards the Good Friends arrived at London. At the time of the vessel's arrival at London, Mr. Charles Banker, on account of the claimant (who had already sailed for and had arrived in England) had purchased about 10,000*l.* sterling worth of her inward cargo. The purchases of the inward cargo were made from funds of the claimant already in England, in the hands of Baring, Brothers & Co. These purchases closed about the middle of December in the same year. The ship left England on the 4th of January 1812, laden with dry goods of best quality of British manufacture. Her clearance, dated 14th of December, 1811, from the custom-house of London, is for Amelia Island, a Spanish port, Rio Janeiro in the Brazils, a Portuguese port, and Philadelphia. On the 9th or 10th of February 1812, the ship arrived at Amelia Island after a direct voyage from London to that place. She lay there, without breaking bulk, until the 10th of April, when she sailed for the port of Philadelphia; and on the 12th of the same month, arriving in the waters of the Delaware, she is seized by an officer of the revenue for this district, for the violation of a law of the United States, passed on the 1st of March 1809, commonly called the non-importation act. The Good Friends for this offence was libelled by the proper officer on the part of the United States, in this district, on the 5th day of May last, as forfeited. This cause was heard, at great length, at the November term last of this court, sitting at Newcastle.

The 4th section of the act of Congress above mentioned, prohibits the importation into the United States, or the territories thereof, after the 20th of May following, of any goods, wares, and merchandizes whatsoever from any port situated in Great Britain or Ireland, or any of the colonies or dependencies of Great Britain, or from any port or place in her actual possession. The same prohibition is by the same law enacted against France but has been since dispensed with. All goods, wares and merchandize, being of the growth, produce or manufacture of Great Britain, or Ireland, or of the colonies or dependencies of Great

Britain, are by the same section prohibited from being imported from *any port or place whatever* ; certain clearances for ports beyond the Cape of Good Hope, &c. only excepted. By the 5th section, the prohibited articles are, if imported into the United States or their territories, forfeited. The 6th section is the only one by which it is alleged the forfeiture accrues, in the present case, of the ship *Good Friends* to the United States. The words are "that if any article or articles the importation of which is prohibited by this act, shall after the twentieth of May be put on board of any ship or vessel, boat, raft or carriage, with intention to import the same into the United States or the territories thereof, contrary to the true interest and meaning of this act, and with the knowledge of the owner or master of such ship or vessel, boat, raft or carriage, such ship or vessel, boat, raft or carriage shall be forfeited, and the owner and master thereof shall moreover each forfeit and pay treble the value of such articles."

It has been truly alleged in the argument, by one of the advocates of the claimants, that the fact of importation is, independent of the act of Congress, no offence. It has, however, been made an offence by the legislative authority of the country, and it cannot be dissembled that the ship *Good Friends* has done the very act prohibited by the fourth section of the act aforesaid ; and that she is forfeited, unless there exist such facts and circumstances in her case, as will exempt her from the operation of the act. The duty prescribed to this court now, is to determine whether this ship has had *put on board* of her British manufactures, and brought them into the United States, under such circumstances as will protect her from forfeiture.

It has been contended by the advocates for the claimants, that there is no evidence in the present case of any intention on the part of the claimant or his agents to *put on board* the goods to import the same into the United States or the territories thereof, and that it is incumbent on the part of the United States to prove such intention.

It is in evidence in this cause that the claimant had vast funds on the continent of Europe, being the proceeds of several cargoes exported and sold there ; that he had endeavoured and very successfully too, to concentrate these funds in the hands of

Baring, Brothers and Co., a house in London; that viewing the uncertain state of the relations between this country and Great Britain, he was very uneasy lest he might fail in accomplishing the great purpose he held in view. His desire to be in possession of his funds, at such a juncture, was very laudable; especially as it would redound to his own security as well as be adding to the resources of his country. The simple question on this part of the case is, whether the claimant intended a commercial profit on the back of the funds which he thus wished to be in his own possession, by lading the *Good Friends* with British manufactures for the American market.

The letter of instructions to the supercargo Mr. Adgate, is dated at Philadelphia, on the 27th of July 1811, four days anterior to the ship's putting to sea. In this letter it is remarkable, that nothing is said in respect to the ulterior destination of the bulk of the inward cargo which was to be taken on board at London. From this letter it would seem as if a part at any rate of the inward cargo was intended to be imported into Philadelphia. This is to be inferred from sundry expressions contained in it, such as the following: "as it respects letters, I have no objection to take in my ships those from American supercargoes, masters, officers and crew to their families or owners of their vessels." Speaking of the purchase of anchors for his new ship, I suppose on the stocks of this country, the claimant says, "and if they cannot be obtained in Portugal or Spain, you are to purchase them in England, &c." Again, "no matter if the anchors are forged in England so they are well made, of good iron bars, &c." And further, "should I want any other articles from England, I will write you in time, care of Messrs. Baring, Brothers, and Co. at London." There is however, a clause in this letter of instructions, which strongly intended that the whole of the inward cargo was expected to be brought into Philadelphia. Speaking of the terms on which he engaged Mr. Adgate, he says, "3d. Five hundred dollars additional will be paid to you if the ship *Good Friends* proceeds from a port in Portugal or Spain to London, and *there* takes in a cargo on my account as before mentioned and arrives safe in this port." What port is meant to be arrived at? Why certainly, the one at which the letter is dated. Where is she to take in her cargo? Plainly

and undoubtedly, at London. He further is desirous of purchasing on *his own* account, a complete set of separate Maps of that part of this continent, from the south boundaries of the United States, including Mexico, all the way round Cape Horn, as far as it is navigable, &c. From these clauses of the letter of the 27th July, it would seem as if the inward cargo, or at any rate a part of it, was destined *at that time* for the port of Philadelphia, the residence of the claimant.

It is now to be considered how far the effect of the above letter is done away by those which follow, of the 14th of October and the 29th of December, 1811. The letter of the 14th of October, was received by the supercargo on the 5th of December ensuing, at London, nine days only before the completion of lading and the date of the clearance. From the evidence of Mr. Adgate, it seems that the purchases of the inward cargo closed about the middle of December. Must not, therefore, an inference arise that before receiving the letter of the 14th of October, a considerable part of the cargo was shipped under the letter of the 27th of July? But the letter of the 14th of October most clearly and unequivocally proves to my mind the destination to both Amelia Island and Rio Janeiro to be *colourable* and not *real*. It is the first paper in this cause, in point of date, which mentions Amelia Island as the place of destination, and orders the ship to proceed "*near enough to our capes to put letters on board to point out the destination*" of the claimants. It appears then that his intention was thereafter "*to be pointed out,*" although he in the same letter orders the clearance for Amelia Island. Could Amelia Island or Rio Janeiro be the place at which he wished his cargo to be unladen and sold? If either of them were, why speak in the letter of pointing out his intention; the continuance of the non-importation acts, and of the orders in council? Neither of these governmental acts could affect the ship or cargo at either Amelia Island or the Brazils. Why wish her to come so near the capes of Delaware, if her destination was *bona fide* for either the Spanish or Portuguese ports?

The letter of the 29th of December, is an after-act, and cannot have much weight in the decision of the present case. It was not received until the arrival of the ship at Amelia Island,

er until the day after. It was written in Philadelphia after the shipment of the cargo at London, and but a short time before the ship left the British waters. Even this document proves only *in his favour* that the claimant did not wish to bring his ship into Philadelphia, and subject her and her cargo to forfeiture directly in the face of the non-importation act. It is ascertained by this letter that she was not to unlade or break bulk at Amelia Island, but was to be kept in such manner as at any time to proceed with her cargo to such port as the claimant should point out. By the way, all this time there is no mention made of the voyage to Rio Janeiro; but there is to be gathered an evident avidity in the claimant, apparent on the face of this letter, on the first intimation that the restrictive act is repealed, that the ship should come direct for the port of Philadelphia; and this too without advice from himself of such being the fact. It follows that this court is of opinion, that the evidence of the intention of lading in London, to import into the United States, is manifest, from the documentary evidence to which we have alluded; and we are further of opinion, that this evidence is strongly corroborated, nay, concluded by the London clearance.

This document is the voluntary act of the captain, and presents, together with the act of since bringing them in, indisputable evidence of the goods being put on board with a view to the American market. In this paper Amelia Island, Rio Janeiro, and Philadelphia are named, and most probably named with a full intention and understanding among the parties, of being filled up in the hand-writing of the custom-house officers at London—not *in print*, but in *manuscript*. To this paper it has been replied by the claimant's advocates, that the ship might not have arrived with her cargo until the repeal of the restrictive acts, and for that event, and with that view, was the clearance filled up with the word *Philadelphia*. I would ask, if this be the course of transactions of this kind, and if there is any evidence in the cause to support such a supposition? Is the lying at Amelia Island upwards of two months, waiting the result of the memorial to Congress presented by the claimant and others in favour of special importations, evidence of such a position? There is, however, still further evidence of a part of the cargo

being *put on board* in London, with an intention to bring it into a prohibited port ; I mean the memorial presented by the claimant to Congress dated on the 9th of March 1812.

By this paper it appears that property in British Manufactures amounting to 1863*l.* 18*s.* sterling, was shipped on board the Good Friends for the express purpose of being brought to, and used in the port of Philadelphia, consisting of "three anchors, a quantity of sheathing copper, copper nails, a small bale of bunting, four night glasses and several charts,"—thereby fulfilling in respect of these articles, the wishes of the claimant expressed in his letter of the 27th of July. These articles, by the explanatory statement annexed to the memorial, are excepted from the general wish which the claimant had of being permitted by Congress to order the ship round to Philadelphia, as a place of safety, and of there entering her cargo for exportation. The captain, he says, has given bonds in England to land the copper and anchors in a port of the United States. From this document then as well as the letter last mentioned, it appears that these articles were intended for the use of the claimant himself; but it has been very ingeniously replied that as these anchors and the other articles composing this part of the shipment, were intended for the use of the claimant and not as articles of *merchandise*, their importation cannot influence a decision of the present case against him, if even *put on board* with intention of being brought here. In support of this principle a case has been cited from 3 *Dal.* 297, as being fully in point. This case has been attentively considered, and this court is of opinion that it does not go the length contended for by the claimant's advocates. It is true, that an act of Congress passed on the 22d of May 1794, prohibiting for one year ensuing, the exportation of arms and ammunition.

The *La Vengeance* was alleged to have exported these articles from the United States against the form of the act, but it appeared that the powder constituted a part of the equipment of the French frigate the *Semillante*, and did never belong to the United States, nor was it of their manufacture; and that the muskets mentioned in the information, were the private property of French passengers on board *La Vengeance* "*carried out for their own use, and not by way of merchandise.*" It must be evi-

dent, that the non-importation act was made to prohibit the introduction into the United States of British merchandize *for any use whatever*, and thereby to strike at the interests of a nation whose government was heaping upon us vexations and injustice without number and without end. We are of opinion that Congress intended to prohibit importations of every article with a view to the consumption of the country ; otherwise the non-importation system would be a laborious nullity and a dead letter ; and surely if Congress had intended to let in British manufactures for any purpose or use whatever, the law would have contained an exception. We however find none ; and as a matter of construction we can never sanction such a one of any law, as would inevitably defeat the ends for which it was enacted. Such a construction is indubitably the wrong one. The whole mercantile class of the community might, under such a construction enter into importations with the avowed object of being *for their own use* ; and by such means the United States in the face of the legislative prohibition might become inundated with British manufactures. This court cannot adopt such a construction, as would, if sanctioned by the judiciary of the country, violate the plain intention of the act, and frustrate all the benefits intended from it.

The act of May 1794 was passed to prevent the United States being drained of those materials, by their exportation abroad, without which, the country could not be defended ; and the construction perhaps was a reasonable one, that twenty muskets, bought by individuals for personal defence, and not with views of mercantile profit or for other foreign markets, could not be considered a violation of the law. Very different in the opinion of this court, is the importation of upwards of 1500l. sterling worth of British manufactures, when our prohibitory act, without exception, forbids the introduction altogether of British merchandize, in terms the most broad and unequivocal.

Independently of the documentary, there is abundant other testimony in this cause of the cargo "*being put on board*" the Good Friends for importation into the United States. The claimant certainly never could intend to lay out nearly 67,000l. sterling in any goods for the purpose of being carried to an uncertain or a glutted market. His funds in England were in able,

responsible hands, and his goods were purchased with monies taken up from Messrs. Baring, Brothers, and Co. in pursuance of his own orders. Importation to Amelia Island of British dry goods, to so great an amount, is inconsistent with the mercantile eminence and known acuteness of the claimant. He would have preferred bringing his money home in bills or in any other manner, to bringing a cargo of such an amount to such a market. His supercargo swears that the whole of the inhabitants of Fernandina of all ages, sexes, and colours, do not amount to 300, and that the land of Amelia Island is very poor and thinly populated. The whole of the wealth of this island was not sufficient for the purchase of this cargo—besides from the good understanding which has existed between the British and Spanish governments for some years past, it is reasonable to conclude, that British manufactures were to be obtained in great abundance anterior to the arrival thither of the Good Friends.

The British are sufficiently eager to supply, indeed to glut, every market open to their manufactures. The Good Friends arrived there on the 19th of February, and lay in the Spanish waters until the 10th of April, without breaking bulk, or exposing any part of the cargo to sale. Nor have we any testimony of its being consigned to any person, to superintend its sale and to account for and remit its proceeds. So far from any of these measures being taken, we have it from under the hand of the claimant, that the vessel was, "to be kept in such manner as at any time to proceed with her cargo to such port as he should point out."—The conclusion from these facts is, that Amelia Island could not have been the *real* port of destination.

But Rio Janeiro is another port of destination. It is, I believe, not mentioned in the claimant's letter of the 14th of October, nor in the original manifest, or the consular certificate, and must have been inserted on the suggestion of the master of the ship, or of some agent of the claimant. The manifest and consular certificate mention *Amelia Island*, &c. The clearance itself mentions Rio Janeiro. There does not appear to have been any obstacle to the ship's proceeding to that market, had such been her intention. That, perhaps, was not an empty market. The British trade there themselves, and it was but reasonable to conclude that an ample supply of their manufactures was on

hand. No attempt was made to enjoy the Brazilian market, though an ample opportunity was afforded, during the delay at Amelia Island. Indeed, according to my recollection, the claimant nowhere mentions this port as the one which in any event is to be the receptacle of his cargo. One of his advocates has urged as an excuse for not going to Rio Janeiro, that the property would *there* have been seized as an indemnity for the seizure of Florida. It is hardly to be supposed that the Portuguese would proceed to such a length for any injury committed against the Spanish government. I am compelled to decide, from these facts united with the paper testimony heretofore considered, that the cargo of the Good Friends was *put on board* at London, not with a *real* destination for Amelia Island or Rio Janeiro, but for the port of Philadelphia in the United States. The last place presented every invitation which mercantile cupidity could hope for, because of the interrupted state of commerce which for some years had existed.

I might here close, and order the decree which would result from the foregoing convictions, but that several other questions of great magnitude have arisen and been discussed in this cause, which it may be thought incumbent on me to decide.

It is urged on the part of the claimant in this case, that the ship is protected from forfeiture by the conduct of the government of the United States, and their agents, in receiving the cession of Amelia Island, and by the conduct of those agents subsequent to the cession. By a secret act of Congress, passed on the 15th January, 1811, the President of the United States was authorized "To take possession of all or any part of the territory lying east of the river Perdido, and south of the state of Georgia and the Mississippi Territory, in case an arrangement has been, or shall be, made with the local authority of the said territory for delivering up the possession of the same, or any part thereof, to the United States, or in the event of an attempt to occupy the said territory, or any part thereof by any foreign government."

On the 26th of January, same year, General George Matthews and Colonel John M'Kee, were appointed by the President joint and several commissioners for carrying into effect the provisions of the foregoing act. It appears from the testimony, that on the 16th of March last, the town of Fernandina, in Amelia

Island, was summoned to surrender by a number of armed people, calling themselves patriots; that on the 17th it capitulated, by striking the Spanish flag to that of the patriots; that on the 11th it was ceded by the patriots to general Matthews, as United States' commissioner, who hoisted the flag of the United States in place of that of the patriots; that general Matthews took possession, at the head of fifty armed men, being a detachment of United States' troops. There were lying in the adjacent waters, from five to eight United States' gun-boats, under the command of commodore Campbell; that at the time of the cession these gun-boats lay opposite the town, side too, with springs on their cables; that after the cession, General Matthews appointed a judge, a collector, a harbour-master, and a notary publick. On the second of April following, the ship Good Friends, theretofore lying in the waters of Amelia river, was cleared out for the port of Philadelphia from Fernandina, by the collector there, whom General Matthews had appointed, after giving bond for securing the duties on the ship and cargo. The clearance was accompanied by a letter from General Matthews to John Steele, esquire, collector of the port of Philadelphia, stating the capitulation, surrender, cession, &c. of Fernandina and Amelia Island. On the 4th of April, the government of the United States disavowed the conduct of General Matthews, revoked his powers, and committed them to another person.

These facts have given rise to several very important questions which were debated at the bar with great science and ability by the advocates of counsel for both sides.

The first question raised is, whether Matthews did or did not exceed the powers delegated to him, by receiving the cession of Amelia Island in the manner he did receive it.

The words of the act of Congress, from whence the whole authority to occupy East Florida originated, are "in case an arrangement has been or shall be made with the local *authority* of the said territory for delivering up the possession of the same or any part thereof to the United States." These words define the first *casus* in which the commissioners were to act, and to occupy the territory for the United States. The language of the letter of instructions to the commissioners is "should you find Governour Folk, or the local authority existing there, inclined to

surrender in ‘*an amicable manner*,’ the possession of the remaining portion or portions of West Florida, now held by him in the name of the Spanish monarchy, you are to accept in behalf of the United States the abdication of his or of the other existing authority and the jurisdiction of the country over which it extends. And, should a stipulation be insisted on for the re-delivery of the country at a future period, you may engage for such re-delivery to the lawful sovereign.” In the 5th paragraph of the letter are the following words:—“These directions are adapted to one of the contingencies specified in the act of Congress, namely, ‘the amicable surrender of the territory by the local ruling authority.’”

From the plain meaning of all this language it would seem as if Matthews, in relation to the first contingency, was to act as a peaceful negotiator and in an amicable manner. In support of this idea the act speaks of an “arrangement,” which has been, or is to be, made in relation to the surrender of the territory. The word “arrangement” here means something depending on and preparatory to a compact, and a compact too, to be made in a friendly manner; that is, without any pre-existing hostility. The word “arrangement,” and those which follow it, must mean something voluntary on the part of the authorities ceding the territory; for no compulsion could be contemplated, as no force in this case was to be resorted to. We must therefore infer, that the clear meaning of this *casus* was a voluntary or an amicable surrender of the territory without the aid of force or the show of military authority. This idea is abundantly supported by the letter of instructions under which General Matthews acted. This paper was penned by the secretary of state, about ten days after the act passed, and though there is a slight variance from the language, yet it follows the meaning of the act. The letter uses these words—“inclined to surrender in an amicable manner the possession &c.” The obvious meaning of this language is, that the territory was to be acquired in a friendly manner, and by compact or negotiation without hostility or the exhibition of a military force.

2dly, as to the authority which was to make the surrender.

With regard to colonies there are generally authorities of two kinds—the authority of the *mother-country* by which the

colony has been discovered, planted and settled, or acquired by conquest or treaty, and which retains and exercises many of the more important attributes of sovereignty; and the "local authority" of the colony, which is exercised for its immediate government, and in the colony itself. The latter is called from usage and propriety of language the "local authority;" by way of contra distinguishing it from the former. The meaning of the words "local authority" as used in the act of Congress, I am of opinion must be such authority alone, as had the immediate, or if you please, the "*local*" government or superintendence of the territory about to be surrendered; namely, the colonial authority and no other. In this sense Congress must have used the term. The authority of the mother-country could not in the nature of things, and never was intended to be applied to for the cession: Governour Folk's name being mentioned in the instructions was a sufficient guide to Matthews, as to the authority intended by the act and by the executive who issued instructions under it. The act uses the words "local authority:" the instructions vary in a small degree from these words: and probably to meet the possible case of Folk's removal from office, uses the words in one place "local authority existing there," and in another "the local ruling authority." In both cases the instructions correspond with the true intent and meaning of the act. They both meant the local provincial or colonial authority. Did *that* authority make the surrender to Matthews? Was it made by Governour Folk or even Don Lopez? Or was it made by the existing provincial or colonial authority? Was it made by that authority which existed when the law passed or which had held the territory of the Crown of Spain? Certainly by none of them! But by such an authority as had *stepped* in between the one Congress had contemplated and General Matthews. Nor does the cession bear that voluntary and peaceful character which was desired and described by the legislative and executive department of our government. But in this case there is a summons by the patriot forces of the town of Fernandina, on the 16th of March to surrender on the next day. It capitulates and surrenders; both of which are measures of war and the consequences of hostile movements.

Under this view of the subject, I am clearly of opinion that the first *casus* or contingency mentioned in the law did not arise; and that Governour Matthews in receiving the cession as he did, exceeded, and of course violated, both the letter and spirit of his powers; that he obtained the territory by *usurpation* and not by compact, unless the second *casus* arose, in which force was to be used, and this brings us to examine whether the second *casus* did arise in which possession was to be taken by force. On this part of the subject I shall attempt brevity, as not much contest has arisen at the bar upon it. It is not pretended that the force to which Fernandina capitulated was a foreign one: that force therefore is laid out of the case. Matthews, in regard to the second contingency, was to *keep on the alert*, "on suspicion of a foreign force being about to occupy the territory;" and he was to pre-occupy it by force, *only* on the first undoubted manifestation of the approach of a force for that purpose. It is not in proof that such a force did approach for such a purpose. It follows that the possession which was obtained was unauthorized and illegal. The agent acted beyond the limits of his authority, and what he did of course was void.

But a *second* question on this part of the case is, whether the bonding at and clearance from Amelia Island to Philadelphia was a *forced* or a *voluntary* act on the part of the agents of the claimant. Mr. Adgate the supercargo states, that after the cession he felt very uneasy for the safety of the property, and waited on General Matthews to know how he was to consider himself, and the property under his charge. Matthews told him he might consider himself in the United States. The supercargo considered the property in imminent danger. Matthews agreed with him. He told the supercargo finally, he would give a clearance from the custom-house of Fernandina, on securing the duties. Matthews required a bond for this purpose in the sum of forty-six thousand and odd dollars, that the vessel and cargo should be delivered in charge to the collector of Philadelphia, until, as Matthews's letter expressed it, "the determination of the government of the United States be known, as relates to her case."

Neither the testimony of the supercargo nor the letter of Matthews enforce conviction that there was any force used to give the bond or accept the clearance. The supercargo indeed im-

plies, and very strongly, that he made the first overture to Matthews, in consequence of his own uneasiness in respect to the property.—Matthews views the clearance in two lights: as a measure of justice, for which he gives no reasons—and as one of policy, lest the vessel and cargo “might invite the attack of piratical marauders.” He seems a little suspicious lest she might bring trouble on his hands.

George Turner deposes that the vessels were not compelled by the government of Amelia Island to depart, but were required to give bonds before they were *allowed* to depart; that the bonds required “that they should proceed to their *destined* ports in the United States, and that the power *de facto* did not take possession of the ships and vessels in the harbour further than the general possession given them by the cession of the island. The only testimony that supports the idea of any compulsion to secure duties, is that of James Girdon. He says, “that all American vessels were compelled to secure the duties on their cargoes for the use and benefit of the United States at Amelia Island, *by giving bond to the collector there.*” This however shows, “what he means by the word *compelled*; we shall however, presently see whether such bonds are compulsory. It further appears that the captains and supercargoes of several ships and among them of the Good Friends, preferred a petition to Matthews, after the cession, on the subject of the ships and cargoes; that Matthews in his answer wished them to vary the form of the application. The first petition to him does not appear in the proceedings, but that pursuant to the form he advises does, and bears a cotemporary date with his reply to the first petition. So it would seem, that so far from any compulsion being used, the arrival into the waters of the United States was on the part of the agents of the claimant *voluntary and solicited.*—By the way, they state that they had been waiting at Amelia Island, until they could be legally admitted to come hither, and state, in the same paper, Philadelphia, as their port of destination.

We do not discover any exercise of the *vis major* in this case. Had such been the fact, our opinion might and probably would have been different; for the coming into the waters of the United States would have been imputable to the compelling

force, and not to the claimant or to his agents. But so far from the *vis major*, we find no exclusive possession taken of the ships which had been riding in the Spanish waters, by the military occupants of the island or by the gun-boats which were in its waters. The ships are as unmolested as before the surrender. The whole uneasiness in the case is with Mr. Adgate. He it is that applies to Matthews to know what to do. Matthews, fearing the colibri, I suppose, which had been seen some time before in the offing, but which had gone further to the south, takes his bond and clears him out for a port in the United States. There certainly then was no external force, or even the offer of it.

The next question which offers for our consideration is, can the bond be deemed compulsion in the case?

The bond, we are told, was given with condition to come to the port of Philadelphia, and with a cargo of dry goods of British manufacture. We have before seen that such articles are forbidden to be brought here, and by the law of the land. It is clearly unlawful to bring in such a cargo. We are informed by our law that a bond given with a condition which obliges a person to do an act or to the performance of a thing which is unlawful, is void. 3 *Bac. Abr.* 703, *Co. Lit.* 206, *b. Cro. Eliz.* 705. The inevitable conclusion is, the bringing in goods of British manufacture being unlawful, a bond with a condition to do *that* thing is void and of no effect. Such an instrument could never form the ground of a recovery in any court of justice in the United States. It could have no compulsory effect belonging to it; and in this view of the subject there was no compulsion to bring in the cargo, even according to the deposition of Girdon.

These are all the questions which I have thought it material to consider in this cause.

I will now beg leave to remark, that in a republican government like ours, which exists only by the force and obligation of its laws, it is of primary importance that those laws should be obeyed; that they should operate equally, that the obedience yielded to them may be cheerful and willing; that if one member of the community shall be exempted from their operation, every other is injured; and has a right to complain and that in proportion as the laws become disregarded and ineffectual, the government from which they emanate becomes enfeebled, and

eventually is incapable of providing for its own security and the happiness of the people. It therefore certainly behoves every functionary of such a government, by whom the laws are to be expounded, to be cautious how he admits facts on principles virtually to do away the force and effect of a law. By admissions of this kind a judicial magistrate may usurp all the powers which belong to a free government. He may *virtually* though he cannot *formally* repeal a law. He may *excuse* though he cannot *pardon* an offence against the law; forgetting the wise maxim of the common law, *sed est tutissima cassio sub clypeo legis nemo decipitur*.—On the other hand it must be confessed; that there are cases of violation of the laws where the offender ought not to suffer their penalties; but the great question in cases of this kind, in a well regulated government, is whether he ought not rather to look up for indemnity to the executive authority, than to the judicial magistrate

The one can listen to the suggestions of clemency in a hard case, while the other is the *lex loquens*, the law speaking, or the medium through which its penalties are pronounced against its violators. I do not mean by what I have said, that a judge should be unmerciful; but merely that he confine himself to those functions, which his government have conferred upon him.

I may do wrong to the claimant, by the decision which I now make; but the wrong is unintentional on my part. If however I have erred, the error will hereafter be corrected by the great and learned appellate authorities before whom this cause will go, when it shall have left this court; and a great consolation to me is, that in cases of magnitude, the final decision is not here. Were my judgment of this case to be formed according to my prepossessions which I have received of the claimants, very different indeed would it be from what it is. But I am bound by a tie which admits no personal partialities or animosities to mingle themselves in my decisions. They can never form the grounds of my decrees.

Let a decree of forfeiture be entered.

COURT OF VICE-ADMIRALTY, 1813.

HALIFAX.

The ORION—Jubin, master.

For the captors—The king's advocate.

For the claimants—The solicitor-general.

CROKE, J.—As this is the first case which has arisen on the American blockades, I felt it to be my duty to give it the fullest consideration. I have examined scrupulously all its circumstances, I have weighed attentively the arguments which have been advanced by the counsel on both sides; I have searched out, and have carefully applied to the present case, all the former decisions of the higher courts which I conceived to have any bearing or relation to it; and I have now to make known to the suitors in this court the result of my inquiries.

The facts in this case are few, and undisputed. The vessel having on board a cargo of flour and Indian meal, sailed from New York, on the 13th of May, 1813, bound to Lisbon, under a license, from the British secretary of state, bearing date upon the 11th September 1812, and which was comprised in these words:

To all Commanders of His Majesty's ships of War and Privateers, and all others whom it may concern—GREETING.

I, the undersigned, one of his majesty's principal secretaries of state, in pursuance of the authority given to me by his majesty by order of council, under and by virtue of powers given

No. XVI.

E

to his majesty by an act passed in the forty-eighth year of his majesty's reign, entitled, "an act to permit goods secured in ware-houses in the port of London to be removed to the outports for exportation to any port of Europe, for empowering his majesty to direct that licenses, which his majesty is authorized to make under his sign manual, may be granted by one of the principal secretaries of state, and for enabling his majesty to permit the exportation of goods in vessels of less burthen than are now allowed by law, during the present hostilities, and until one month after signature of the preliminary articles of peace," and in pursuance of an order of council hereunto annexed, I do hereby grant this license for the purposes set forth in the said order in council to Cropper, Benson &c. and others, and do hereby permit a vessel, being unarmed, and not less than one hundred tons burthen, and bearing any flag except that of France, or except a vessel belonging to France, or to the subjects thereof, or to the subjects of any territory, town or place annexed to or forming a part of France, to import into the port of Lisbon, from any port of the United States of America, a cargo of rice, grain, meal or flour, without any molestation on account of any hostilities, that may exist between his majesty and the said United States of America, notwithstanding the said cargo and ship aforesaid may be the property of any citizen or inhabitant of the said States or to whomsoever the said property may belong, and that the master of the said vessel shall be permitted to receive his freight, and return with his vessel and crew to any port not blockaded, upon condition that the name and tonnage of the vessel, and the name of the master of the said vessel shall be endorsed on this license at the time of the vessel's clearance from her port of lading.

This license to remain in force for nine months from the date hereof. Given at Whitehall the 11th September 1812, in the fifty-second year of his majesty's reign.

SIDMOUTH.

It is admitted by the captors that the license is good in itself, and that the terms of it have been complied with, but it is alleged by them that the vessel and cargo are still liable to condemnation, notwithstanding the license, for having broke the blockade of New York.

There are two points therefore for consideration. The first is a question of fact, whether New York was blockaded at the time the vessel sailed from thence. The second is a question of law, whether, supposing the blockade to be established, the license can protect the vessel from the consequences of coming out of that port during its continuance.

The master has sworn roundly "*that he had no knowledge of the blockade.*" But there is full proof that the *notification* of it, which was made by Lord Castlereagh by the authority of the prince regent upon the 20th March, was at that time known at New York. It is contained at full length in the *Evening Post* a newspaper published in that city, of the 6th May, and consequently nine days before the vessel sailed, and it is morally impossible that information of so important a nature to the mercantile inhabitants should not have been universally intercommunicated amongst them.

It has been argued by the captors that this notification alone establishes a blockade. That being a publick act, and proceeding from so high an authority nothing more is required, and that it would constitute to all intents and purposes a blockade, even if there were not a single vessel off the port; that the cases from which the contrary might be inferred were cases of notification from commanders in chief, and not by the publick authority of the sovereign, and that in the blockade of the French coast it was never required that there should be any vessels stationed off the ports; that even if it were necessary to prove the fact of the ports being actually blockaded by ships of war, the capture of this and many other vessels are sufficient evidence of it.

It has always been held by the British Courts of Prize, that to constitute a blockade two things were required; that the ports in question should be invested by a force adequate to the purpose of preventing egress and ingress, without imminent danger of capture, and that notice should be given of it to all the parties who were to be legally affected by it. The actual investment is absolutely essential to constitute this state, and as early as the West India cases it was decided by the Court of Appeals, "that a declaration unsupported by the fact will not be sufficient to establish a blockade." In this respect there is no difference whatever between a publick, and the most private notification.

The object of both is the same, merely, *to inform the party who is to be charged with the breach of a blockade, that a blockade exists.* A notification given by a commander, is as much under the authority of the sovereign as if it were an act immediately proceeding from him, because commanders derive from him the power of blockading such ports as they may judge proper. The most formal and diplomatick notification between governments is only meant for the information of individuals. Publick notifications made to the government of a country will affect the inhabitants of that country with the knowledge of it, after a certain time, as a presumption *juris et de jure*, because it is the duty of governments to communicate it to all their subjects, but, whenever it can be proved that any individuals are acquainted with the existence of the blockade *by any other means*, the consequences will be to them the same. But under all modes of notification it is absolutely necessary that there should be the fact of actual investment, without which no notification is effectual.

What has been called the blockade of the French coasts, by the well known order of the 26th of April, forms no exception to the principles maintained upon this subject by the British nation. That was a measure perfectly different from a blockade. It did not profess to be a blockade, but on the other hand, the words of the order were "that those ports should be subject to the same restrictions *as if* the same were actually blockaded by his majesty's naval forces in the most strict and rigorous manner." The word blockade was introduced not as a definition of the measure itself, but by way of explanation of the mode in which it was to be executed; in the manner of an actual blockade. No investment was even supposed to take place, because it was impossible that there could be an investment to the whole extent of the coast affected by the order. It was not therefore a blockade, but it was a retaliatory measure to counteract the effects of an unjust and unlawful attempt to ruin this country by cutting off its resources. It was not directed against particular ports, but against the enemy's trade universally. It was a total prohibition of all commerce with the enemy, as he had prohibited all commerce with Great Britain, and it would have been ineffectual and futile if it had not comprehended all the

dominions of France, and if it had been limited within the legal boundaries of a blockade. As none of the rules of law relating to blockades were therefore applicable to those orders which militated against their design, so no inference whatever can be drawn from thence, that the laws of blockade, before admitted in the British courts, have been in any manner altered or deviated from.

There is no necessity therefore to imagine with the counsel for the claimant, that those orders have been abandoned by the British government either *in fact* or in *principle*.—They never have been *in fact* annulled.—The supposed repeal was merely provisional and the conditions not having been complied with by the American government, they are still in force, as has been decided in this court in some recent cases.* They can never be abandoned in *principle* till this proposition is admitted to be true, that “it is the duty of a nation to submit to the annihilation of its commerce and resources, when it is attempted by its enemy, with a view to its final subjugation, and destruction without an effort of struggle or resistance, because that resistance may be some inconvenience to a third country.” Our enemies, both open, and in disguise, naturally are vehement in their outcries against the orders in council, because they have proved too successful in defeating their malevolent designs, but, as long as the right of self-defence shall continue to be the first law of nature and nations, so long will those retaliating and defensive measures rest upon the solid foundation of eternal truth and justice.

It is necessary then to establish in this case besides a notification brought home to the knowledge of the parties, which has been sufficiently proved, that a blockade *de facto* existed. It is indeed to be supposed from the notification itself, that orders would be given to carry the intended blockade into effect. Yet this is not so conclusive as to carry with it a presumption that it has been actually done. It was argued by the captor’s counsel that even if the high officer who has the supreme command on this side the Atlantick, should refuse to execute the order, that the court, would be bound to execute it, and to enforce the law.

* The Marquis de Someruelos, the George, and the Phœbe.

But this is not a true state of the case. If it were possible that an officer should be guilty of a great breach of duty in not observing orders sent to him by government, still though he might be personally responsible for the neglect, yet that would not supply the want of the fact that a real blockade had taken place. It has been held in the High Court of Admiralty,* that, even where there was an actual investment, if any of the blockading ships have not enforced it, that the blockade is so far "virtually relaxed."—There is no evidence that the port of New York has ever yet been in a state of blockade. It is not known as a matter of notoriety, or from the capture of vessels. There is no special evidence of it afforded by this case. No vessels were seen off the port.—The capture was made in the latitude of 40 degrees, and in the longitude of 70 degrees and 20 minutes, by the prize-master's affidavit, at the distance therefore of nearly one hundred and fifty miles from New York. There is no circumstance therefore to lead us to a conclusion that the port of New York was in a state of blockade. Where the existence of a blockade has been generally known and continued for some time, and by public notification, it is presumed *prima facie* to continue till it is revoked. In such case when a blockade has really existed, it has been held to be incumbent on the party alleging the relaxations to prove it. But in the present instance, where it is not known that any blockade has ever commenced, I think it fair that the party who is to have the benefit of the blockade should establish it by evidence. If the case therefore depends upon that fact, I should direct the captors to bring further proof of it, and should allow the claimants at the same time to bring such other evidence as they may judge proper upon the point.

This however will be unnecessary if it should be found that notwithstanding a blockade, this ship and cargo were protected by the license, which brings me to the consideration of the second point in the case. This license is dated on the 11th September, 1812, and the question is whether it is annulled by the subsequent order for blockading the port of New York, as far as that, or other blockaded ports are concerned, or in other words, whether, under a license to import goods from any port in the

* *Jussum Maria*, Rob. 3, 135.

United States, they can be exported from a blockaded port in that country. I have examined all the cases to be found which at all relate to this question. A recent case, that of the *Byfield Forster*,* was the case of a vessel which was said to have had a license granted to certain British merchants, permitting a vessel to proceed from *any port in the Baltick* to any port in the United Kingdom.

The vessel went into Copenhagen, then blockaded, and came out with her cargo with which she was sailing to Liverpool when she was captured. It was laid down most strongly by Sir William Scott, that "a license expressed in general terms, to authorize a ship to sail from any port with a cargo, will not authorize her to sail from a blockaded port with a cargo taken in there; to exempt a blockaded port from the restrictions incident to a state of blockade, it must be *specially designated with such an exemption in the license: otherwise a blockaded port shall be taken as an exception to the general description in the license.*" Nothing can be laid down more forcibly and generally than this doctrine. Yet it seems that there may be *exceptions* to it. In the *Hoffnung*, Berens† *without any such express exemption in the license*, where it had been granted on the same day when the notification stated the blockade to commence, the learned judge "laid all question of blockade out of the case; for he thought himself bound to presume that *it was intended* the parties should have the full benefit of importing the articles without molestation from a blockade which could not be unknown to the great personage under whose authority the license was issued."

Another ground of exception was taken and admitted in the same case, for the judge concluded that since "the blockade was not considered as a ground for withholding these licenses, he was led to suppose, that it was not *intended* to have the effect of suspending such as had already been granted."

In the case first cited where the general doctrine was laid down so universally, but which must be understood with some little reference to the particular case in which it was stated, it was said that "as the vessel was lying at Christiansand, an open

* 1st. Edwards, 122.

† Rob. 2. 162.

port at the time when the license bore date, and there was then no intention manifested of going to Copenhagen, the license could not be of a nature to prohibit the purchase of a cargo there, a transaction which was not *in contemplation* when the application was made," still referring for an explanation of the license to *the intention of government*. It may then from these three instances be fairly inferred as the judicial opinion of that great man, that notwithstanding there is no express provision in a license or a blockading order to that effect, yet wherever it appears to have been *THE INTENTION* of his majesty, or of those who exercise his authority, that the permission given by a license should not be suspended by an order of blockade, that it is not affected by the blockade.

But before I consider the application of these principles to the present case, it must be observed, that there is *in limine* a very material distinction between them. All those cases were of licenses, granted to British subjects or neutrals and the blockades were of ports belonging to third nations our enemies. This is the case of a license granted to the enemy, and the blockade is of his own ports. These are such material circumstances that the other cases cannot in any manner be considered as directly applicable to the present.

For the truth is, that a blockade is not a measure which *legally* affects *the enemy* at all; it operates in point of law, only upon neutrals, upon them it has a real legal effect; it gives new rights to the blockaders—Without it neutrals might trade in safety to the port. It is the blockade alone which creates the right of capturing their vessels. But the vessels and the other property of the enemy would be equally liable to be captured and condemned, although a single blockade should never be established. It is indeed a disposal of naval forces which renders the capture of his property more easy to the blockading ships, and which distresses him by excluding neutrals, but this is all. As to the enemy's property, the blockaders acquire no new right by it. Before a blockade is established, they can seize and confiscate the enemy's property, wherever they find it, and during a blockade they can do no more. It affects the enemy *de facto* and not *de jure*. That a blockade affects merely neutrals, is evident from the form of *notification*. This is conceived always

nearly in the same words. It is signified to the ministers of *neutral powers*, and it informs them "that measures will be adopted, which are authorized by the law of nations, and the respective treaties between his majesty and the *different neutral powers*." The *instructions* to the blockading vessels, by which the blockade is established, are to stop all *neutral vessels* destined to or coming "out of the respective ports." No notification is made to the enemy, no instructions are given relative to the capture of his property, because it requires no special directions. Since then no orders are given to the blockaders respecting his property, it is left precisely as it was before the blockade; that is, liable to be captured generally, unless where it is particularly protected by orders from the British government, or other peculiar circumstances. Since the orders to the blockading ships specify, and relate only to *neutral vessels*, they cannot authorize the capture of *enemies* vessels though protected by a license, which are *not neutral vessels*, although to ascertain their general rights and duties, they have sometimes been considered in that light, in the way of analogy, and of a partial similitude, which does not hold good in every respect, but which might be estimated from the nature and object of the special protection so granted, and of the document by which it is conferred. Since a blockade creates no right of capturing enemy's property which did not before exist; if this general right of capturing his property has been suspended by a license, I do not see how it can be revived or renewed by a blockade; or how the cruisers can acquire from the blockade a right to capture the enemy's property in a case where that right had been superseded by the act of his own government.

Neither does the *object* of the present blockade at all interfere with that of the license, but on the contrary they are independent of each other, and both consistent. That of the blockade is to distress the trade of the enemy, but the design of the license is not to assist the trade of the enemy, or for the accommodation of any of the merchants of that country, but to relieve our own wants, and to promote an important and interesting service. If it was an object with the British government to victual our troops in Spain, that object is not affected by the blockade.—

It is equally necessary that the soldiers should be fed whether New York is blockaded or not.

Adopting from British and neutral cases the principle that the effect of licenses is to be deduced from the *intention* of the British government, as far as it can be ascertained from circumstances, let us endeavour to discover what must have been its intention with respect to these licenses. I have just observed that the object of them was for the benefit of the British military service. The armies employed in the cause of liberty, were starving in Spain. Most of the ports of Europe were shut against British vessels. It was necessary to have recourse to the United States, as long as those necessities continued which these licenses were intended to remedy; it must be supposed to be the intention of government that the supply should be continued. The *existence* of these licenses themselves, unexpired and unrevoked, is *prima facie* presumptive evidence that those articles are still wanted, till that presumption is overruled by a declaration to the contrary. In the next place, though the license is general, and extends to any port in America, yet in fact the blockaded ports of the Chesapeake, and the other southern ports of America, are the only ports from which flour and corn can be expected. The northern countries of the United States do not grow enough for their own consumption, and are supplied from the southern ports. If government wishes therefore to be supplied at all, it is only from the blockaded ports that it can receive the supply.

Some evidence of their intention may be deduced from the form of the license. It says that "these articles may be imported from any port of the United States, without molestation on account of *any hostilities* which may exist between his majesty and the United States of America." It might not be overstraining the expressions to interpret the words "*any hostilities*" to mean "notwithstanding any *mode* of hostilities which Great Britain may think proper to employ, whether by blockade or otherwise." It is true that the blockade was not established till many months after the date of the license, but it was not improbable in the contemplation of the British government. To carry on the war with that country by blockading their ports has always been a general and favourite idea. Something of the consideration of blockade must have been present to the mind of those who drew

up this order in council, because it is thus mentioned:—"The master of the said vessel, shall be permitted to receive his freight and return with his vessel and crew, to any port not blockaded." It seems to have been understood and intended, that the license could and should protect the master against breaking a blockade, or why else should it have been thought necessary to prohibit his return to a blockaded port? Understanding the licenses then to have been a protection from the penalties of blockade breaking, though they do not forbid coming out of, and exporting the articles described, from a blockading port, it is a fair conclusion that this was not intended to be prohibited. The reason of the distinction, as it is to be deduced from the present existing circumstances, and which were probably foreseen when the license was granted, on the grounds which I have just stated, is evident. It was only by coming out of a blockaded port that the license could be executed, and its object accomplished, because the provisions to be imported to Lisbon could only there be procured.

It may reasonably be doubted whether by a license of this nature, a kind of vested interest is not conferred upon the grantee, of which he cannot be deprived capriciously, at the mere will of the granting nation, or, *at least*, whether he can be dispossessed of it without an express declaration of the government by which it was granted. Since it is a privilege which is to protect the property of the enemy, and *for the benefit of the country which grants it*, not only the interest but the good faith and honour of the country are implicated and pledged to respect them. They ought not to be revoked without full and timely notice. Adverse considerations ought not to be pressed too rigorously against them, but they should be supported by their most liberal interpretation. In case of doubt, the balance should incline in their favour; it is a contract for the benefit of one party in which the British government says, in fact, "if you will import provisions to the army in Portugal, we will protect your vessels from capture."—When the Americans are performing their part of the contract, it would be a trap to turn round upon them and tell them that the protection is withdrawn, without any previous notice having been explicitly given to that effect. In point of prudence, by allowing the validity of these licenses, little mischief can be done. As they were limited to nine months, they have

now nearly all expired, since it is understood that none have been issued since the beginning of October. The object of the blockade will not be defeated by allowing them. The departure of half a dozen flour ships will not materially relieve the distressed commerce of the United States, but the intercepting of them may be injurious to the British service in the peninsula, and may be considered as not very creditable to the liberality and good faith of Great Britain. By restoring this property therefore, I conceive that this court will but maintain the justice, the honour and the policy of the country.

Such is the view which I have been enabled to take of this subject. It were to be wished that publick documents upon which the important interests of many individuals depend, should be clear and definite in their language, that nothing should be left to supposition, and that either in the license it should have been explicitly stated, that the exportation might or might not be made from a blockaded port, or that in the order for the blockade, it should have been declared whether it was to extend to licensed vessels. If this had been done we should not have been driven to the necessity of divining meanings and intentions. Parties, including captors and claimants, commanders and merchants, would not be placed in a state of doubt and anxiety, and this court would be relieved from the painful duty, too often imposed upon it, of making its way amongst various difficulties, and opposite obligations, frequently with no other guide than probability and conjecture. If the parties are not satisfied with the decision of this court, it is competent to them to apply to the superior tribunal, where the instructions and object of his majesty's government are known *a priori*, and not left to be determined by hazard and distant reasoning.

A REVIEW

[Of the cause of the New Orleans Batture, and of the discussions that have taken place respecting it; containing answers to the late publications of Messrs. Thierry and Derbigny on that subject, by Peter Stephen Du Ponceau, counsellor at law, of counsel with Edward Livingston, Esq.

Dans toutes les affaires, il y a un centre, un point principal, contre lequel toutes les chicanes doivent échouer.—VOLTAIRE.

THE cause of the New Orleans Batture is now brought to a simple point.

The corporation of that city last year applied for and obtained the interference of the national government in their behalf, on apparently plausible grounds, supported by the opinions of the most eminent lawyers in their country.

They have since been convinced that those grounds were not tenable, and have solemnly disavowed them in a publication sanctioned by their authority.

They nevertheless still claim and expect governmental aid, on *new principles*, which when examined, will be found not more tenable than the former ones.

The counsel who prepared those different opinions have attacked and successfully combated each other's doctrines in the newspapers and elsewhere; one of them has expressly called on the national authority to disregard the laws, and enforce their claim by *military power*.

The government will now judge, wheiher under these circumstances, they ought any farther to interfere in this case.

I have endeavoured in the following sheets, to show the futility of the various doctrines on which the corporation of New Orleans have founded their claim. If I have succeeded, I owe it in a great measure to the advocates employed by my opponents, whose arguments against each other have been of the greatest use to me.

THE AUTHOR.*

Philadelphia, 27th February, 1809.

* Since this "Review" was published, Mr. Jefferson has submitted to the world a defence of his conduct in the shape of instructions to his counsel in the case of *Livingston v. Jefferson*. See No. I. of this volume. In this pamphlet, Mr. Jefferson,—very unfairly, we think,—

REVIEW.

CAUSE OF THE NEW ORLEANS BATTURE.

BATTURE is the name given in Louisiana, to the soil which is formed by the alluvions of the Mississippi. The Batture now in question, is a piece of alluvion land situate on the banks of that river, in front of the suburb of St. Mary, abjoining the city of New Orleans. The ground on which that suburb is situated, is part of an estate which formerly belonged to the order of Jesuits, and which in the year 1763, when that order was suppressed in France, was condemned and sold as forfeited to the crown, by the Supreme Court of Judicature of that province. That estate contained thirty-two arpents, or French acres of front on the river, by fifty in depth. On the space of about seventeen of those thirty-two acres of front stands the suburb St. Mary, the Batture opposite to which alone is in controversy; for the right of the individual owners of the remainder of the Jesuits' plantation to the Battures in front of their grounds is not and has never been meant to be contested, although it is much the largest portion of the alluvion, which considerably widens as it recedes from the city.

The river Mississippi is subject to an annual inundation which lasts about six months. As the land between that river and the sea lies very low, the whole country would be at that time co-

passes over the "Review" without any notice, and takes up the question as it stood before Mr. Duponceau made this second argument. A very learned friend and correspondent of the Editor, speaks in the highest terms of this defence,—calling it a *réplique sans réponse*. It is able, but the credit of it belongs to others. It is no more than a repetition of the arguments already employed by Messrs. Derbigny and Thierry, and so ably refuted by their antagonist. From this remark we must except that part in which Mr. Jefferson justifies his taking forcible possession of the Batture, after a judgment in favour of Mr. Livingston, in the highest court of law of that Territory. This is not touched by Mr. Duponceau: but when we come to publish Mr. Jefferson's defence—which, in justice, we are bound to do, and by his politeness have been permitted to do,—we shall endeavour to show that the ground—like the alluvion which is the subject of dispute,—is easily washed away.—*Editor*.

vered with water, were it not that its progress is stopped by means of dykes or embankments, which are there called *levees*. Every owner of land fronting the river is by law obliged to raise and keep in repair such embankments, along the whole front of his estate, and behind it to leave a space of forty feet open for a publick road. But as the Mississippi in its annual freshes, usually carries a quantity of earth, mud and sand, which, when it recedes, it leaves at the foot of the embankments, those alluvions thus gradually formed, become in process of time portions of solid earth, susceptible of being used and improved like any other ground. When a portion of alluvion land has been thus formed sufficiently large and solid to make it worth the owner's while to enclose and annex it to his adjacent estate, the law and custom of the country authorize him to take possession of it, and to effect that purpose by removing the levee or dyke, and altering the scite of the high road; such, it is admitted has been the *general usage*,* and it is moreover, a conceded fact, that the Gravier family, under whom Mr. Livingston claims, previous to the cession of Louisiana to the United States, made use of that privilege. For, when the property of the Jesuits was sold, that estate was found by survey to have only *fifty* acres in depth, and during the pendency of John Gravier's law suit, with the city of New Orleans, the land was again measured, and its depth was found to be *fifty-six* acres. This difference, says one of our opponents, (Mr. Thierry) can only have proceeded from portions of alluvion ground, successively annexed to the adjacent land.†

In the year 1788, Bertrand Gravier conceived the idea of establishing a suburb on that part of the Jesuits' estate which he possessed. He therefore caused a plan to be made in which he laid out his ground into streets and lots. In the year 1796, he enlarged that plan, by adding new streets and a publick square to his suburb; he then sold off the greatest part of his lots, and the suburb of St. Mary rose into existence. The Batture at that time not being enclosed, was not laid out in the draught like the

* See Mr. Derbigny's opinion published with Mr. Livingston's pamphlet, page xxxvi.

† See the case stated for Mr. Derbigny's opinion, page xv.

See Mr. Thierry's *Examen des droits des Etats Unis*, page 36 in French, 37 in the English translations.

other parts of the ground. It appeared there as a Batture in its then existing state, without any designation, to show to what future use it was intended to be applied. When he sold his water lots, Mr. Gravier sometimes sold with them portions of the Batture, and sometimes did not. The deeds by which he made those sales were publick, made in the most solemn form, according to the law of the country, and recorded in the office of a notary publick, who was also at the same time secretary of the *cabildo*, or corporation of New Orleans.

In the mean while the Batture, like all unenclosed property in newly settled countries, was left open to the free use of the inhabitants, who took earth and sand from it for raising their streets, repairing their embankments and for other purposes. It appears that they had done so from the time of the existence of the Batture. When it began to exist is not clearly ascertained; there are witnesses who assert that there was no Batture opposite the Gravier estate, when the Jesuits' property was sold in 1763. Others say the contrary; but that is of no consequence as it is admitted that the Gravier since that time, enclosed and annexed to their estate *six acres* of the Batture which then existed, and of course that which now exists, must have been formed at a long subsequent period.

In the year 1804, Bertrand Gravier being dead, John Gravier his brother finding that the alluvion was of sufficient value and extent to justify the expense, threw up a dyke and enclosed a portion of the Batture, of about five hundred feet square, and began to oppose the practice of digging sand and earth from its soil. The corporation of New Orleans then claimed it as a right, and disturbed him in the enjoyment of that property, on which Gravier brought a suit against them in the Superior Court of the Orleans Territory, for the purpose of being quieted in his title and possession, and that the inhabitants might be enjoined from digging sand and earth out of his land as heretofore.

The corporation appeared to the suit and attempted to establish their claim on two grounds: 1st, on the ground of prescription. 2d, on the ground of a verbal abandonment of the Batture, which they pretended to have been made by Bertrand Gravier at the time when he laid out his estate into a suburb.

To the first allegation it was answered, 1st. That a right of common, being what the civil law calls a *discontinuous servitude* could not be prescribed for by the law of the land, by a less period than what is called *time out of memory*, which cannot, according to that law, be less than one hundred years. That it was even doubtful whether the Batture had existed forty-two years,* and therefore there could be no prescription. 2dly. That by the same law, those who claim a right of *prescription* must show an exclusive possession by themselves, whereas it appeared that the Batture was not only used by the citizens of New Orleans, but by all persons without distinction.

To the allegation of abandonment, it was answered: 1st. That the transmission of real estate, by one person or body corporate to another could only be proved by a written instrument executed in due form of law, and not by parole evidence, much less by such vague and contradictory testimony as that which had been adduced; some of the witnesses stating that Gravier had abandoned the Batture to the *corporation*, some to the *publick*, some to the *suburb generally*, and some to the *proprietors of the front lots*. 2d. That if Gravier had abandoned any thing, it was the mere temporary use of the Batture, until it should suit him to enclose and annex it to his adjacent estate.

On both these grounds the court, after three solemn arguments, in which much learning and ingenuity was displayed on both sides, decided clearly and unanimously in favour of Gravier, and dismissed the claim of the corporation of New Orleans.

It should be further mentioned that the corporation by their plea also put Gravier upon the proof of his title to the Batture. Under this head, the doctrine of alluvions under the French, Spanish and civil law was fully gone into, and the court determined that the Batture had clearly become the property of Bertrand Gravier, under whom John claimed, and that it had become *annexed to and incorporated with his inheritance*.

The superior court of the Orleans Territory, being a court of the last resort, from whose decision there is no appeal, there appeared to be an end of this important controversy. But the

* From the year 1763, when the Jesuits' property was sold, to 1806 when the suit was brought.

corporation of New Orleans did not give up the contest, and the ingenuity of their counsel readily supplied them with the means of renewing it.

Louis the 14th, king of France, towards the latter part of his reign had made certain edicts by which he declared that the beds of navigable rivers, and all islands and other accretions formed therein belonged of right to the crown. On the construction of those edicts, the lawyers of France had been divided in opinion: some (and those by far the greatest number) had thought that as *alluvions* were not nominally mentioned in the declaratory part of the statutes, they were not included within their meaning, and that they remained as before, the property of the owners of the adjacent estates, except in those provinces where the local customs had vested them in the king: others on the contrary had maintained the opposite doctrine. This question had long been a subject of controversy in France, until some years before the late revolution, it was solemnly decided by a decree of the Parliament of Bordeaux, confirmed by the Parliament of Paris, that *alluvions* were not within the edicts, and that they accrued to the owners of riparian lands. This controversy the counsel for the corporation of New Orleans, thought that it would suit their purpose to revive, keeping out of view the decisions which had settled it.*

In pursuance of that system, a motion was made to the superior court of Orleans to open their judgment and grant a new trial, in order to let in the claim of the United States. But after hearing the counsel for the motion during two days, the court dismissed

* By a declaratory edict of the 28th of July 1756 the king himself in his council of state expressly acknowledged that the crown was not entitled to alluvion lands. The words of the edict run thus: after ordering that a survey should be made for the purpose of ascertaining what alluvion lands exist on the banks of certain rivers, the king adds: "*sans néanmoins que l'on en puisse induire que les alluvions, atterrissements et relais formés sur les bords des dites rivières, en d'aucune rivière navigable, puissent appartenir à d'autres qu'aux propriétaires des fonds adjacents à la rive des dites rivières et à nous, lorsque la rive des dites rivières sera adjacente à des fonds de terre appartenants à notre domaine.*"

[Thus terminated a controversy which had long excited the utmost zeal and abilities of the French jurists. It is not reasonable to believe that a gentleman so well read as *M. Derbigny* appears to be, should have been ignorant of this decision:—yet he has gone back to the edicts of 1683, 1693, and 1710, to establish a right in the throne, which was expressly abandoned by the celebrated *Portalis*, in one of his publick speeches on the *Napoleonic code*.—*Ed. Law Journ.*]

it, without even hearing the opposite side. Mr. Gravier then took out his execution and was placed in the quiet possession of the Batture.

Soon after this Mr. Livingston who with Mr. de la Bigarre had acquired that property of Mr Gravier by purchase, began to improve it according to a plan which he had devised, and which, when completed, would have given to the suburb St. Mary a range of canals along its whole front, which would have afforded a convenient birth for ships and other vessels and by erecting stores on both sides of those canals would have facilitated the lading and unlading of goods, without the expense of cartage.

But Mr. Livingston's enemies were determined at any rate to wrest that property from him. Mobs were resorted to in the first instance, and several attempts were made to obtain the possession of the Batture by force. That, however, did not succeed, the governour addressed the rioters and prevailed upon them to desist from their unlawful purpose. Then was conceived the bold project of inducing the American government to take an active part in this domestick controversy, not for their benefit, indeed, but for that of the corporation of New Orleans,* by persuading them that the property of the Batture was vested in the United States in right of the kings of France, the former sovereigns of Louisiana. This assertion was supported by the opinion of Mr. Derbigny, a gentleman of respectable standing at the bar at New Orleans, and understood to be skilled in the French and Spanish laws; but who having made up his mind while he was of counsel for the corporation, displayed in his elaborate discussion, more learning than correctness, and more zeal than impartiality. The case on which that opinion was given is understood to have been prepared by Mr. Moreau Lislet, another of the city advocates, a gentleman also of considerable learning and ability, but whose partiality for the cause which he had espoused, is evident from the very case which he drew up, which is not, as a document of that sort is expected to be, a plain, simple and undorned statement of facts, but is written in an argumentative and

* A bill was brought into the House of Representatives at the last session of Congress, ceding all the rights of the United States, in the Batture, to the corporation of New Orleans. The session being too near its close, it was not acted upon.

declamatory style, and begs the questions which it calls upon counsel to decide.*

This case, with the opinion of Mr. Derbigny subjoined to it, was immediately sent on to the seat of government, accompanied by representations calculated to impress the executive with an idea that the city of New Orleans would be utterly ruined, unless a speedy and effectual remedy were applied to their imaginary grievance. It was stated, on what foundation I shall show in the sequel, that the Batture was the only spot from whence sand and earth could conveniently be procured for raising their streets, that the whole city was in danger of being laid under water for want of those indispensable materials, and that the works which Mr. Livingston was carrying on, unless arrested in time, would bring on the inhabitants the dreadful scourge of pestilence.† These powerful considerations contributed not a little to produce the executive measure which has given rise to the present discussion.

In this state of things, Mr. Livingston laid his case before me, and requested on it my professional opinion. I read with the greatest attention that which had been given by Mr. Derbigny in favour of the claim of the United States, and was soon satisfied that it was not tenable. Although it was divided into five distinct propositions, yet it rested only upon three material points.

I. That the United States were entitled to the Batture in right of the kings of France, who by virtue of certain edicts of Louis XIV, were the lawful owners of all alluvion lands within their dominions.

II. That the Jesuits' estate to which the Batture belongs, was not at the time of its sale, bounded by the Mississippi, but by a

* The gentlemen who had undertaken to defend the claim of the United States, have repeatedly, and in the most unequivocal terms, charged me with partiality in the opinion which I gave in favour of Mr. Livingston; I may therefore with propriety retort the charge upon them, particularly with the certainty that the facts will bear me out.

† See the case stated for Mr. Derbigny's opinion, p. 2, 3. [See the case stated, and the opinions of Messieurs Derbigny, Livingston, Duponceau, &c. in the second volume of our first series.—Ed.]

publick road, the soil of which belonged to the sovereign, and which had been excepted out of the grant.

III. That Bertrand Gravier had abandoned or given up his right to the Batture.

To the first of these propositions I answered,

I. That it was true that there were edicts of Louis XIV, under which the French exchequer had claimed a right to the alluvions of navigable rivers; but that after a long controversy in which the lawyers of France had taken different sides, the point had been, before the late revolution, solemnly settled by the Parliaments of Paris and Bordeaux, against the king and in favour of the subject.

2. That the claim of the French sovereigns to alluvions being derived from feudal prerogative, had never been extended to the colonies, where the feudal law was not established, and that in Louisiana particularly, the alluvions of the Mississippi had constantly been enjoyed by the owners of the adjacent grounds.

To the second proposition I answered,

1. That the road in question did not belong to the sovereign, but was a mere *servitude* or charge upon the estate.

2. That it had not been reserved out of the grant, either expressly or by any reasonable implication.

3. That on the contrary the estate was described in the instruments of title, as fronting the river, (*face au fleuve*) and not as fronting the road, (*face au grand chemin.*)

To the third proposition I answered,

That Bertrand Gravier had indeed consented that the publick should have the free use of his Batture while it remained unenclosed, but that he had never given up the property thereof. That the Spanish government, on various occasions, had shown that they considered him as the owner of the Batture, and that its officers had even permitted him to alienate sundry parcels thereof.

Upon the whole, I concluded that the claim of the United States to the Batture could not be supported either in law or in fact.

This opinion was published at New Orleans, by Mr. Livingston, together with his own able "Examination of the title of the United States to the Batture," in which Mr. Derbigny's positions

are amply refuted. This last work brought conviction home to every candid mind, and the corporation themselves were compelled to abandon the grounds which Mr. Derbigny had assumed. They caused a work to be published under their express sanction, and at the publick expense, in which the propositions laid down in Mr. Derbigny's opinion were expressly given up, and the claim of the United States was attempted to be supported upon entirely new principles ; the last effort of exhausted ingenuity.

I allude to the publication of Mr. Thierry, entitled " *Examination of the claim of the United States, and of the pretensions of Edward Livingston, Esq. to the Batture in front of the suburb St. Mary,*" 51 pages 4to. published at New Orleans by the author, both in the English and French languages, at the expense of the corporation,* and which by their order has been distributed to the officers of government and the members of both houses of Congress. In that work, avowed by our adversaries, and relied on by them, the principles on which their former counsel, Messrs. Moreau and Derbigny had founded the *nominal* claim of the United States, are given up in the most explicit manner.

Let us hear Mr. Thierry on the subject of Mr. Derbigny's first proposition, *that the United States are entitled to the Batture, in right of the kings of France under the edicts of Louis XIV.*

" I will not deny," says that gentleman, page 30, in English. " that the ancestors of John Gravier were the riparious landholders, to whom the right of alluvion *certainly belonged*, not only by virtue of the coutume de Paris, which for two centuries back acknowledged the principle of the Roman law, and against which, for that reason, the ordinances of the kings of France could with no manner of success be pleaded, inasmuch as a royal ordinance specially made that coutume the civil law of this colony; but also by virtue of the Spanish laws, which from 1769 have been constantly in force in Louisiana."

Mr. Thierry goes farther ; he proves in the most incontestible manner, that the French laws have nothing to do with the present controversy, as the Batture which *now* exists, was entirely formed since the establishment of the Spanish government in

* See Appendix, No. I.

Louisiana. "When," says he, "the Jesuits' property, of which that of Mr. Gravier is but a portion, was surveyed by Devezin, in the year 1763, it contained but *fifty* arpents in depth, whereas it results from the survey *lately* made by Mr. Mansuy, that the Gravier plantation, beginning from the angle of the suburb on the city side, is found to have a depth of *fifty-six* arpents. Of this difference, the *sole cause* to be assigned is, the successive re-union of *different portions* of alluvion, of which B. Gravier, and those from whom he holds, may have availed themselves."*

Now it is left doubtful by the testimony taken in the Gravier cause, whether there was or not any Batture existing in front of the Jesuits' estate in the year 1763, when the property was sold. Mr. Derbigny at most contends that there existed at that time a *commencement of Batture*.† The Spanish laws were established in Louisiana, only six years afterwards, in the year 1769. Surely it will not be contended that *six acres* in depth of alluvion ground could have been formed, consolidated and *successively* annexed to the principal estate in that short space of time. The last parcel at least must have been annexed after the year 1769, when the Spanish law had superseded the French ordinances. It follows, therefore, that the Batture which is the object of the present controversy, was formed under the government of the law of Spain, and of course that the edicts of the kings of France, cannot in manner operate upon it.

It is thus that Mr. Thierry not only has controverted the first and most important proposition of Mr. Derbigny, on legal principles, but has furnished us with a fact and an inference which altogether destroys its application to the present case.

As to the other propositions of Mr. Derbigny, Mr. Thierry dismisses them in a very few words. "The first," says he, page 7, in English, "of Mr. Derbigny's five propositions, embraces the fundamental point of the whole question; and strictly considered, *the other propositions are no more than corollaries of the first.*"

And to crown the whole, Mr. Thierry has the goodness to compliment me, page 8, in English, "for having discovered, as he says, with great sagacity, the *weak side* of Mr. Derbigny's

* See Mr. Thierry, page 37, in English.

† See his reply to my opinion page 5, 25.

performance." I do not accept this compliment; Mr. Derbigny had, it is true, a weak cause to support, but the manner in which he has managed it, will always do him the greatest credit with all impartial judges of professional talent.

At any rate, here is a *formal disavowal* by the *corporation of New Orleans*, (who by the sanction which they have given to it, must be considered as the *authors* of Mr. Thierry's work) of the opinion of Mr. Derbigny, on which they until then had relied. As it was on the faith of that opinion, *now abandoned*, that Mr. Livingston was deprived of the possession of his property, justice seems to require that he should immediately be re-instated into it; for it must be presumed that the corporation will not want advocates, who will raise up a new legal edifice as fast as the former ones shall be overthrown, and by that ingenious device this controversy may be protracted until the delay of justice shall amount to a complete and peremptory denial.

Mr. Derbigny, as may well be supposed, was highly displeased with the disrespectful manner, to say the least of it, with which his opinion was treated by the very clients whom he had so ably and so faithfully served. He resented it by a publication in the *Louisiana Moniteur*,* in which he complained of the abandonment of those principles which he conceived would have been of the greatest advantage to the common cause, and gave a pretty correct idea of those which Mr. Thierry had substituted in their place, by saying that he had brought the cause to that point, that it now depended on the more or less correct understanding of a *nice definition*. Mr. Thierry replied in the *Louisiana Courier*, by charging Mr. Derbigny with having *mutilated* the *only* quotation which he had made out of his work, and with not having read it with sufficient attention† But I hope I shall be able to show that Mr. Derbigny had well read and understood him, and that both he and Mr. Thierry have been more successful in combating each other's doctrines than those of their adversaries.

Mr. Derbigny, however, generously stifling his private resentment, has thought it his duty once more to step forward in de-

* See Appendix, No. II.

† Ibid.

fence of the cause of his ungrateful clients, by an elaborate work, entitled, "Refutation du memoire en forme de consultation, redigé par M Du Ponceau, au sujet des pretentions des Etats Unis sur la Batture du fauxbourg Ste Marie ; 60 pages, 8vo., New Orleans, 1808. In that performance he combats, with what success I shall presently show, the opinion which I gave last summer in answer to his. But more experienced in forensick warfare than our common antagonist, Mr. Thierry, he gives up no point, and abandons no position ; forgetting the opinion which in his newspaper publication he had expressed of the principles on which Mr. Thierry rested the cause, he assumes those very principles, and enforces his competitor's arguments with the same zeal that he does his own. The *nice definition* on which, under Mr. Thierry's management, the fate of the Batture hung suspended, becomes in Mr. Derbigny's hands a ray of light, which dispels every doubt and clears up every obscurity : and so in fact it does ; for I hope I shall be able to show that that identical definition, does of itself destroy all the arguments which have been attempted to be deduced from it in favour of the claim of the United States.

Having brought this narrative to the present point ; it remains for me to show the fallacy of the principles and arguments contained in the voluminous works of Messrs. Thierry and Derbigny. It cannot be expected that I should follow them through fifty quarto and sixty octavo pages ; I have not like them the talent of being at the same time diffusive and interesting. But by a short review of the principal points which they have made, I hope I shall be able to convince every impartial reader of the futility of the claim which they profess to support.

As Mr. Derbigny's work is not sanctioned by the corporation of New Orleans, but on the contrary all the principles which it contains, except those lately brought forward by Mr. Thierry, have been expressly discarded by them, I conceive that there is no obligation on my part to take notice of this refutation of my opinion, the *premises* of which are conceded by our adversaries ; but every thing which comes from the pen of Mr. Derbigny, is entitled to respect : I shall therefore briefly comment on what he says in reply to my answer to his opinion ; I shall then proceed to refute, and that, I believe can be done without much labour,

Mr. Thierry's *new doctrines* and the arguments by which he and Mr. Derbigny have endeavoured to establish them.

It will be recollected that the first and most important principle on which Mr. Derbigny founded the claim of the United States, was the pretended right of the kings of France, under certain edicts of Louis XIV, to all alluvion lands within their dominions.

In my answer to this first proposition I stated that this had been indeed a question long agitated in France; but that *previous to the late revolution*, the point had been *settled* by the *solemn decision of the Parliaments of Bordeaux and Paris*, who had determined that the sovereign's right did not extend to alluvions, but that they belonged to the owners of the adjoining lands.

I stated this important fact on the authority of M. Portalis, an eminent French lawyer, and counsellor of state, who by order of the first consul of France, at the time when the chapter of the new civil code, which treats of *rivers* and their *alluvions*, was laid before the legislature of that country for their approbation, made a speech to that body in which he entered into a full explanation of the subject, and in the course of it stated what the law had been in that particular, previous to the late revolution. He told them that the crown of France had claimed a right to the alluvions of navigable rivers, that the claim had been resisted and opposed, and that it had at last been *settled by the highest judicial authorities of the country*, that it was not founded in law, and that alluvions rightfully belonged to the owners of the adjacent lands.

It was incumbent, therefore, on Mr. Derbigny either to deny the assertion which I had made, or to controvert the authority of the adjudications of the French Parliaments on the subject of the construction of a French edict. But he preferred to waive the point in a manner which shows how much he feared to meet it.

After discussing, in a very ingenious and able manner, the authorities produced by Mr. Livingston and myself on the general doctrine of alluvions, *prior* to the parliamentary adjudications which decided the question, and having, as he conceived, completely defeated us on that ground, he triumphantly ex-

claims: "Now, I do not see what remains to our adversaries of that crowd of authors who were to prove that Mr. Pothier, was the only one who was of a contrary opinion to their own.—But I am mistaken; they still have the *reasonings* of M. Portalis, and of the tribunal of Rouen on the subject of the principles which were proper to be adopted in the new French code, five years ago! They afford, to be sure, a very powerful demonstration that the edicts of Louis XIV, were not to be in force, *half a century ago!*"*

If any impartial man will say that this is a fair and a candid answer to my argument, and that it is not a clear evasion of a point which the adversary dared not meet, I will instantly give up the cause. I did not rest the question on any *reasonings* of M. Portalis, as to what the *new law* was to be; I relied on his *solemn testimony* of what the *old law* actually was, on his testimony of a fact not only within his knowledge, but within the knowledge of *all France*, of a fact, I dare assert, within the knowledge of Mr. Derbigny himself, who does not venture to controvert it. Is this fact, then, of so little importance, in a cause like this, as to deserve no other answer than a contemptuous sneer at the *reasonings of M. Portalis*, the author of the Napolean code, and one of the ablest jurists that France in any age has produced?

In the same manner M. Portalis asserts, (and who better than he can pretend to be informed of the origins of the French law) that the supposed *droit d'alluvion* was derived from the *feudal system*. Mr. Derbigny denies this, but he adduces not a single authority in support of the contrary assertion. It is, says he, a *droit regalien*, page 26, a *droit fiscal*, page 27, a *droit of sovereignty*, *ibid.* But it may be all that, and still be *feudal*. Mr. Derbigny ought to know better than to substitute *words* in the place of arguments and authorities.

Considering the right of alluvion, as in fact it is, as a *feudal right*, I argued, that it could never have taken place in Louisiana, because *feudality* never was established there. Mr. Derbigny has not attempted to prove the contrary of that proposition or to show that a *single estate* in that country was held by

* See Mr. Derbigny's reply, page 24.

a *feudal tenure*; but he quotes (page 26 in note) a French edict of 1664, to prove that the first grantees of Louisiana *might*, if they had pleased, have disposed of their lands in *feudality*, because that was left entirely at their discretion. Mr. Derbigny has surely forgotten the trite adage of the logick of the schools: *a posse ad actum, non valet consequentia*.

Such is the manner in which Mr. Derbigny has endeavoured in his reply to my opinion to support the claim of the United States to the Batture, by virtue of the edicts of the kings of France, and to refute the arguments by which, I think, I have sufficiently demonstrated the futility of that pretension. But I am wasting time in taking notice of this pretended refutation; for, if it is true, as the corporation of New Orleans through their organ Mr. Thierry, themselves assert it, that the Graviens have since the purchase of the Jesuits' property, annexed *six acres* of Batture to the principal estate, what need is there of this tedious discussion of the French laws, which are now proved to have no kind of application to the subject?

Mr. Derbigny is very angry, indeed, with Mr. Thierry, for making this important concession.* He would willingly, if he could, have kept this material fact out of view. But he is too candid to deny it, which he would certainly have done, if it were susceptible of denial. Throughout the whole of his lengthy refutation, Mr. Derbigny is silent about the *six acres* of ground which in 1805 were found by survey to have been added to the depth of the Gravier plantation since 1763, and which could be no other than parcels of Batture, *successively*, as Mr. Thierry says, consolidated and annexed to that estate. What is the reason of this silence? Will Mr. Derbigny say that he thought the fact of no consequence? But we are in possession of his publication in the Louisiana Moniteur, in which he holds a very different language. Why then is he so angry with Mr. Thierry for stating that identical fact? Why does he reproach him with having, by that admission, defeated his own arguments, and left the cause *without resource*?† And if that was the case, why

* See his newspaper publication, Appendix No. II.

† It is unfortunate that he, (Mr Thierry) has laboured to destroy his own work, by admitting that the Graviens, &c. *If that were true, no resource would remain against the Graviens*, But to prove that at the time of the establishment of the suburb, there was no portion of Bat-

did not Mr. Derbigny point out in his elaborate work the mistake of his colleague and prevent the effects of his fatal concession.

It is true that Mr. Thierry, in his reply to Mr. Derbigny, published in his own Louisiana Courier, denies the extent of the concession, and pretends that the passage referred to by his critic has not been attentively read. But, how does the fact stand? Mr. Thierry, in the page quoted, (36 in French, and 37 in English) says: *that the Gravier since the year 1763, have added six acres to the depth of their estate, which could not proceed from any thing else but parcels of Batture successively consolidated and annexed*; Mr. Derbigny states him to have said, that the Gravier have since 1763, constantly enjoyed the right of annexing consolidated parcels of Batture to their estate. Now what is in substance the difference between these two modes of expression? The *successive* annexation of *six acres* of Batture implies, I believe, a pretty constant exercise of the right. But whether constant or not, it is enough for us that the right has been exercised, that the Batture which existed in 1769, when the French laws ceased to be in force in Louisiana, has been with the tacit permission at least of the Spanish government, annexed to the principal estate, and that the Batture which now exists, having been formed since that period, cannot in any manner be affected by the laws or edicts of the French kings.

Mr. Derbigny has not replied in a more satisfactory manner to my answer to the next principle on which he rests his cause, to wit: that the Gravier estate is not bounded by the Mississippi river, but by a royal or publick road, *the soil of which belongs to the sovereign*, and which is, says he, the identical road which existed in 1763, at the time of the sale of the Jesuit's estate.

I was not prepared, at the time when I wrote my opinion, to answer the last part of Mr Derbigny's proposition, but Mr. Thierry's candid acknowledgment has furnished me with the ready means of doing it. If it is true that since 1763 the Gravier family have annexed six acres of the Batture which then existed to their adjacent property, they must necessarily have stopped up the

ture sufficiently consolidated to be susceptible of being thus incorporated with their estate, but the contrary has been ascertained, and may still be proved.

See Mr Derbigny's newspaper publication at large, in appendix No. II.

road which then lay between, and opened a new road between the enclosed parcels of Batture and the river. No wonder then that Mr. Derbigny was so much displeased with a concession so pregnant with mischief to his cause, since the famous royal road, that *immutable boundary* of the Gravier estate, about which so much has been said and written, can be no longer in existence, but its royal soil is now covered with handsome and comfortable houses, as a part of the suburb St. Mary.

Not being, however, apprized of that fact, I took it for granted that Mr. Derbigny's assertion was correct. I simply answered, - that, however the law might be in France about royal or publick roads in general, the soil of the road in question did not belong to the sovereign of the country, but to the individual owner of the adjacent estate. I proved from Mr. Derbigny's own statement, that when the lands bordering on the river Mississippi were granted by the French government to the original settlers, no part of the soil was reserved for a publick road, that the grantee was only bound by a clause or condition expressed in his patent, to supply the publick with a road at a reasonable distance from that river; and that according to *general usage*, the grantee made that road nearer or farther off, as he thought proper; that sometimes he stopped up the old road and made a new one; for provided there was a road convenient to the river he fulfilled his conditions.* I inferred from these facts, that by the opening of the road, there was no alienation of its *soil* to the government, since the grantee could stop it up and open a new one at his pleasure; that the keeping of a road open was only a covenant on his part, and a mere charge upon his estate, or as it is termed in the civil law, a *servitude*. I illustrated this inference, by showing that there existed a similar law in France, by which the owners of lands bordering on navigable rivers are obliged in like manner to open a *royal road* near to the river for the publick use, and that the property of the *soil* of that road nevertheless remains in them, and is not vested in the king. And I argued that the clause, inserted in the Louisiana grants, could only be consi-

* See Mr. Derbigny's opinion, page 36, in which these facts are stated in the very words that I have used.

dered as an enforcement of that law or an application of its principles to the colonial estates.

The answer of Mr. Derbigny to these arguments, consists of mere assertion and vague declamation. The right which the inhabitants of Louisiana enjoy of removing at pleasure the scite of the royal road, he says, is a mere toleration of the government. As if a government could be said only to tolerate what is authorized by general and immemorial usage. He charges me* with violating every legal principle, by the assertion that a *publick road*, a *high road*, a *royal road*, can be a mere servitude or charge upon an estate, when he ought to have disproved the fact by which I showed that such a thing exists and has long existed in France, the country from whence Louisiana first derived its laws, and the whole of his argument consists in an attempt to prove that by the French, and by the civil law the *soil* of publick roads belongs to the sovereign. When I wrote my opinion in answer to that of Mr. Derbigny, I did not think it worth while to notice that proposition; I thought it sufficient to prove that the soil of the *road in question* did not belong to the sovereign of the country; but since Mr Derbigny persists in resting his argument upon a doctrine which cannot be supported on any legal principle, I am bound to say something on the subject.

I say then, that it is a doctrine known and established in every country where the law bears the semblance of science, that the *use*, indeed, of highways, belongs to the publick for the purposes to which highways are usually applied; and that that use is to be regulated by the laws made and promulgated by the sovereign of the country, but that the soil itself and the right of property in it remain in the individuals from whose land it had been separated to be thus appropriated to the publick use. It is in this sense and in no other, that the civilians, and the French and Spanish lawyers have said, that highways, publick roads, or royal roads *belong* to the publick which makes use of them, or to the sovereign who regulates that use.

This principle is the same which is established among us. It is familiar to the common lawyers, and is to be found in a varie-

ty of English authorities.* It is quite as familiar to the civilians and French lawyers, quite as familiar to Mr. Derbigny himself. For in order to make it appear in the clearest manner, I need only refer to himself and his own quotations.

Thus, page 53, of his reply, he quotes the following passage from Domat's publick law, book I. Tit. 6, § 1st. "That species of immoveables (highways) is not reckoned as part of the property (*les biens*) of the sovereign, it produces no revenue; the rights which the *publick* and the sovereign have to it, are of a very different nature from the right of ownership.†"

And just below that quotation, Mr Derbigny himself says: "It is then clear that the title of the sovereign, in as much as it concerns that part of the domain, which Vattel calls *common property*, and Domat, *publick things*, consists only in the right of regulating the *use* of those things, for the common advantage of all"‡

Is it not strange, then, that Mr. Derbigny will still insist that the publick or the sovereign, have a *right of property* in the *soil* of highways, when the very authorities which he quotes, and the very maxims which he himself lays down are in full proof of the contrary doctrine—what is this but arguing for the sake of making a trial of skill, without the hope of producing conviction?

Passing on to another argument, Mr. Derbigny had insisted that the soil of the publick road was either expressly or impliedly reserved out of the sale of the Jesuits' estate, after the king of France had resumed it, to the ancestors of the Graviere. To prove the express reservation, it was said, that the engineer, who at the time of the sale made a survey of the estate, had planted a stake, at the point A at some distance inside of the

* 2 Stra. 1004—1 Bur. 133.

† Ces sortes d'immeubles, ne produisent aucun revenu, ne se comptent pas au nombre des biens; et les droits qu'y ont le public et le souverain sont d'une autre nature que ceux que donne la propriété.

‡ Il est donc clair que le titre du souverain, en tant qu'il regarde cette partie du domaine que Vattel appelle *biens communs*, et Domat, *choses publiques* se borne au droit de régler l'usage de ces sortes de biens ou choses, pour l'avantage commun de tous.—Mr. Derbigny's reply, page 53.

road, and had made that stake A his point of beginning; from whence Mr. Derbigny argued, that as he had not planted that stake in the *Batture*, which was at that time covered with water, or in the *dyke*, which is allowed to be a very convenient place for geometrical operations, or in the middle of the *road*, for the sake of being less disturbed, it must be clearly inferred, that the road was intended to be excluded from the Gravier estate, and to be a fixed and immutable boundary to it—To disprove this strange inference, I adduced the testimony of two respectable surveyors, Messrs. Lafon and Trudeau, who declared that those points were never intended for boundaries, but were merely to fix the courses and to facilitate the operation of surveying—In reply, Mr. Derbigny wisely rejects these proofs, because, says he, those gentlemen, who by their names appear to be both Frenchmen, are *Spanish surveyors*, and know nothing of the *French mode of surveying*. It was then incumbent on Mr. Derbigny to have produced *French surveyors* who would have explained to us their own manner of operating; but he has been too prudent to attempt it.

The allegation of an implied reservation of the road out of the sale of the Jesuits' estate, was founded upon nothing but the circumstance of its not being expressly mentioned in the deed. In answer to that, I proved that the sale was made by virtue of a decree which ordered *all* the Jesuits' estate to be sold, that if the road was not nominally mentioned as *included* in the act of sale, neither was it mentioned as *excluded* from it; that the estate on the contrary was declared to be sold with all its *appertenance*s and *dependencies*, and *without any reservation*, and having proved, as I thought, that the Batture and the road were *appertenance*s to the principal estate, I thought I might safely conclude that they passed along with it; to these arguments, Mr. Derbigny only replies; that the road belonged to the king, and therefore it was reserved; that it was reserved and therefore it continued to be the king's property. Out of that magic circle, my utmost efforts have not been able to draw him, and there I am obliged to let him remain.

I am then, I think, warranted to say that Mr. Derbigny has not satisfactorily answered my objections to his second proposition. As to the last, the pretended abandonment of the Batture

by Bertrand Gravier, he considers it himself as of so little consequence, and I so fully agree with him in this particular, that I think it needless to take any further notice of it here. In the conclusion of his reply, Mr. Derbigny leaves this ground out of the recapitulation of those on which he relies ;* and in his opinion, page 29, he says: *all these facts* (the facts adduced by him in proof of the pretended abandonment) *would not give a title to the sovereign, if he had it not already, neither do they add any thing to the title he has.* It would therefore be trifling with those who are to determine this cause, to say any thing more upon this subject.

• Upon the whole it appears to me, that this last publication of Mr. Derbigny has been written *ab irato*, in order to show to the corporation of New Orleans, how much could yet be said by a man of legal talents and ingenuity in support of their cause, and to point out to them how much they had erred in rejecting, in a fit of despondency, the aid of professional men, and throwing themselves into the arms of a *layman*, respectable, indeed for his learning and literary acquirements, but unaccustomed to forensick warfare, candid to a fault, and whose imprudent concessions had brought their cause to an issue which could only terminate against them. But to prove that Mr. Derbigny never meant to produce conviction in the minds of competent judges, I need only appeal to himself. Sensible of the value of his high professional character, he has taken pains to intimate his real object in a sufficiently intelligible manner in the very beginning of his reply. For that purpose he ingeniously assumes that the opinion which I gave last summer in favour of Mr. Livingston, and to which he pretends to reply, is not in fact what it professes to be, an *opinion*, but a laboured *argument*, on behalf of a favourite party. Thus, says he, I am obliged to follow that

* In my opinion, the right of the United States rests on grounds which cannot be shaken. It is founded, 1st, on the French laws which reserved to the king the alluvions of navigable rivers. 2d. On the existence of a royal road which necessarily separated from the river the estate sold to the ancestors of Gravier. 3d. And *lastly*, it is founded on the great principles of the publick law of all nations, because the Batture of the suburb of St. Mary, has not yet ceased to be within the banks of the river Mississippi—Mr. Derbigny's reply 29, 30. These three grounds are therefore the only ones on which the counsel for the corporation pretend to reply, and all the rest are *surplusage*.

example, otherwise, we should not stand upon equal grounds. I therefore not called upon *to deliberate, but to argue*.*

In plain English, this means: "I am not called upon to declare my *candid deliberate opinion* on the subject of the claim of the United States to the Batture, but to make it appear by means of *ingenious arguments*, as favourable as I can."—This, surely, is not the language of firm conviction.

Why am I obliged also to take notice of the concluding part of Mr. Derbigny's reply, in order to show beyond a doubt, how little reliance he places on the effect of his arguments? With pleasure would I blot out, were it in my power, that unfortunate paragraph, in which Mr. Derbigny calls upon the Congress of the United States, to trample the law under their feet, and to enforce their unjust claim *at the point of the bayonet*! But it stands on record, and the angel of mercy alone can now efface it. I copy it with a trembling hand:

"Not only," concludes Mr. Derbigny, "I make no doubt, that this right will be sanctioned, *if* the United States shall think that they ought to submit it to a discussion before the tribunals; but I believe that Congress will perceive that this is not a litigious controversy between them and disturbers of the publick repose; that in this circumstance, their rights of sovereignty soar above distributive justice, and that they *must speak not as equals, but as masters*."†

(Signed)

P. DERBIGNY.

I pause———and leave my reader to those melancholy reflections which the above sentiment cannot fail to produce.

* Il s'agit donc aujourd'hui, non de deliberer, mais de plaider, si je ne veux pas combattre avec des armes trop inegales.—Mr. Derbigny's reply, page 10.

† Non seulement je ne fais aucun doute que ce droit sera sanctionne, si les Etats Unis, croyent devoir le soumettre a une discussion devant les tribunaux; mais je crois que le Congres reconnoitra qu'il ne s'agit point ici d'une affaire litigieuse entre lui et des perturbateurs du repos public; que dans cette circonstance ses droits de souverainete planent au dessus de la justice distributive, et qu'il faut parler, non en egal, mais en maitre.

(Signed)

P. DERBIGNY.—See Mr. Derbigny's reply, page 60.

I have done with Mr. Derbigny's last publication, as far as it may be considered as a reply to my opinion. I proceed now to consider the *new arguments* brought forward by Mr. Thierry, and in which Mr. Derbigny has thought proper to join him, though this new edifice is professedly built on the ruins of his own. I have perused Mr. Thierry's voluminous work with the greatest attention; it shows him to be possessed of a stock of knowledge on the subject of general jurisprudence, which falls to the lot of but few of those who have not made it their professional study, but it shows at the same time that those acquirements in matters of science which are sufficient for the purposes of elegant accomplishment, will not do for practical use, and that the application of every branch of human knowledge, is safest in the hands of those who profess it exclusively, and have made it the study of their lives.

In order to be able to answer Mr. Thierry's arguments with some degree of method and clearness, I have extracted from it *four* distinct propositions, which appear to me to contain in substance the whole of the principles on which he rests his cause. It would have taken too much time to have followed the order of his discussion, which I dare say is a very excellent one, but which I acknowledge that I could not easily follow. I pledge myself that in reducing his argument to specifick heads, I have done it with the greatest fairness, and that I have left nothing out of view which has appeared to me to require to be answered.

The four propositions which Mr. Thierry appears to rely upon are the following:

1. That the Batture is a part of the *bed* of the Mississippi, and as such is publick property.
2. That admitting it not to be a part of the bed, but a bank of the Mississippi, still it is publick property, because by the civil, French and Spanish laws and by the law of nations, the *banks* of rivers belong to the publick.
3. That according to the civil law, *alluvions* accrue only to the owners of *country estates*, not to owners of *city property*.

4. That Mr. Gravier having alienated the front lots of the suburb St. Mary, the right to alluvions being merely accessory to the principal estate is gone along with it.

I shall consider these propositions successively and in their order.

FIRST PROPOSITION.

That the Batture is a part of the bed of the Mississippi.

The scene is shifted—The Batture is no longer an *alluvion*. It is simply a *Batture*; a kind of *non-descript* thing *sui generis*, a thing which has never been known or heard of in any other country, and consequently a fit subject for *non-descript* principles, and *unheard of* rules of law.

I am not astonished at Mr. Thierry's taking up this *entirely new ground*, after the former ones have failed; but I must say that I wonder very much at his being followed by Mr. Derbigny, who throughout the whole of his elaborate opinion affected to call the Batture by the name of *alluvion*,* and even rested the claim of the United States, on the laws of France respecting *alluvions*—It is true that he apologizes for this versatility, by saying that he heard every body call the Batture an *alluvion*, and that he *echoed* the name along with the rest.† But how will he apologize for *echoing* Mr. Thierry's arguments, after declaring that they have nearly ruined the cause?

The reader undoubtedly expects that something very important is to be effected by this change of denomination. He will not be disappointed. The object is no less than to remove the Batture from the *bank* into the very *bed* of the Mississippi; when that is done, it will be proved, that by the French, the Roman

* See the five propositions into which Mr. Derbigny has divided his opinion, in every one of which the Batture is called an *alluvion*, the *alluvion*, the *alluvion* in question, &c. and by no other name.

† See Mr. Derbigny's reply, page 43.

and the Spanish law and by every other law in the world, the bed or channel of navigable rivers belongs to the publick or to the sovereign of the country, which is the same thing and the Batture being safely lodged in the middle of the Mississippi, it will necessarily follow that it belongs to the people, or to the government of the United States.

It will be difficult to understand how the name of *Batture* or that of *alluvion* can make any difference as to the *position* of what is meant to be described by one or the other of those denominations *within* or *without* the banks of the river; the difference is this: every body knows what is meant by an *alluvion* or *alluvion land*, and that it is no part of the bed of a river; but every body does not know the meaning of the word *Batture*; our adversaries therefore, may dispose of it as they please. Thus Oliver Cromwell, say the historians, chose the title of *protector* in preference to that of *king*; because the powers of the one were defined, but those of the other were not. Let us, however, try to meet this *novel* question.

The Roman legislators wisely foreseeing all the possible aberrations of the human mind, have taken great pains to define the precise meaning of words, well knowing the danger which might result from the abuse of them. Thus among other things, they have clearly defined seas and rivers, their beds, their banks, and every thing which belongs to them. The Spanish law, formed on the model of the Roman code, has adopted in substance the same definitions. By those definitions, Mr. Thierry, and after him, Mr. Derbigny, have attempted to prove that the *Batture* lies *within* the banks of the river Mississippi, and forms a part of its *bed*. I shall follow them through their arguments, referring to their own quotations, and to no other.

"The *bank* of a river," say the *digest*, "is that which contains the river in the strict natural course of its waters." *Ripa autem ita recte definietur, id, quod flumen continet naturalem rigorem cursus sui tenens,** "The *bed* of a river," says the Spanish law, "is all that which its waters cover, at any time of the year, when it is at the highest." *La ribera del rio es*

* Dig. 43, 12, 1, §.

*entiende todo lo que cubre el agua de el, quando mas crece, en qualquiera tiempo del ano.**

Mr. Thierry lays hold of these definitions, and reasons thus: The *Batture* is covered with water nearly one half of the year, when the Mississippi overflows, it is then certainly at the highest, and therefore it may be said to be within the *bank* and a part of the *bed* of that river.

But unfortunately for him, the Spanish law explains what it means by saying, *when the river is at the highest*, by afterwards immediately adding these few words: "when it does not overflow its bed or channel," *sin salir de su hiema y madre.†* And the Roman law adds in other words precisely the same thing: "But it (the river) does not change its banks, when it is swelled for a time either by rains or the sea, *or by any other cause.*" *Cæterum, si quando vel imbris vel mari vel qua alia ratione ad tempus excrevit ripas non mutat.‡*

Then, says Mr. Thierry, the law undoubtedly means here to speak of mere *accidental* inundations, and not of *regular periodical* ones, like those of the river Mississippi.§

But the same Roman text has foreseen this quibble, and proceeds to illustrate its position, by saying: "For nobody said, that the *Nile*, which covers Egypt by its increase, has thereby changed or extended its banks; but when it is reduced to its usual height, the banks of its channel *may be enclosed.*" *Nemo denique dixit, Nilum, qui incremento suo Ægyptum operit, ripas suas mutare vel ampliare. Nam cum ad perpetuam sui mensuram redierit, ripæ alvei ejus muniendæ sunt.||* Now as the inundations of the Nile, like those of the Mississippi, are not only *periodical*, but *annual*, it should seem that Mr. Thierry could not carry on the argument any further; but as Mr. Derbigny says, *we are not at the end of his resources.***

The inundations of the Nile, he replies, are beneficial to the inhabitants of Egypt, they are not obliged as we are, to contain

* *Curia Philippica* part 2. B. 3. C. 1. One or the other of these is the nice definition to which Mr. Derbigny alludes in his newspaper publication, and on which he laments that Mr. Thierry has hung up the cause.

† *Cur. Phil. Ibid.* § *Dig. Ibid.* § Mr. Thierry, page 15. 16, in *English*.

|| *Dig. Loco citato.* ** Mr. Derbigny's reply. page 39.

the waters of the river with dykes; on the contrary they do every thing to give to those waters a free passage, because they fertilize their country; whereas in Louisiana, were it not for the dykes which we have erected all along the river, the whole country would be overflowed and inundated.*

The reader is certainly at a loss to find out what this has to do with the question whether the *Batture* be a part of the *bed* or of the *bank* of the Mississippi. It is, however, on this curious distinction that Mr. Thierry founds the *git* of his argument, which we have not yet perceived and which I am now going to state.

Every thing, says he, must be considered as a part of the *bed* of a river which is *contained within its banks*. In order therefore, to decide the present question, we must clearly understand what is meant by that word, the *bank* of a river. Now the true idea of a bank is an embankment, a box, a something higher than the level of the water, which restrains and keeps it within its proper bounds. Now the Mississippi has no banks of this description, for its waters are higher in the time of the inundations, than the surface of the country. It is true that Egypt is precisely in the same situation, but it is the misfortune of the people of that country; they are doomed to have forever a river without banks, and the traveller who visits Cairo and Alexandria must look for those cities in the bosom of the Nile, for the ground on which they stand is a part of its bed. But in Louisiana, we may, if we please, escape that calamity; fortunately for us, we have erected dykes all along the shores of the Mississippi; let those be its artificial banks, for want of natural ones, and let every thing which is contained within them be called the *bed* of the river.† By this simple process we shall secure to our river the indispensable appendage of banks, and the *Batture* to the United States.

This is certainly a most ingenious discovery; I know of but one that can in some degree vie with it; that of the prompter in the *Critick* who contrived to place both banks of the river Thames on the same side.—But to be serious.

Every body knows, with the help of plain common sense, that it is not the height of the banks of a river which constitutes the

* Mr. Thierry, page 21, in English.

† Mr. Thierry page 26 in, English.

extent of its bed or channel; at whatever point its waters usually stop, when it is at the highest, *out of the time of inundation*, there its bank begins and its channel ends. The immutable laws pre-ordained from all eternity by the great Author of all things, by him who can say to the waters of a river as well as to the waves of the sea: *thus far shall ye go, and no further*, are more efficient than all the dykes which the art of man can erect. Let us look then for the banks of the Mississippi where the God of nature has placed them; within them we shall find the true extent of its bed, and without them—the *Batture*.

Then, “*ever while you live, Mississippi, go between your banks.*”

SECOND PROPOSITION.

By the civil, French, and Spanish laws, and even by the LAW OF NATIONS, the banks of rivers are publick property.

The *Batture* is now returned to its proper place. It is no longer within the bed of the Mississippi, but as before, constitutes its bank. But that, says Mr. Thierry, is still publick property.

Here then is the mighty question of publick law on which Mr. Thierry seems principally to rest the whole of his argument; that question, he says, Mr. Derbigny and I ought to have considered and discussed, before we entered into any further examination of the present case, and the not attending to it has been the cause of all the errors into which we have both fallen.* What this question precisely is we are at a loss to understand, even from Mr. Thierry himself; he tells us indeed, that roads, rivers, their beds and their banks, sea-ports, and a variety of other things are publick things or publick property; that they *belong* to the publick or to the sovereign of the country; but in the midst of all this looseness of expression it is impossible fully to

* Mr. Thierry page 7 in English.

comprehend what he or Mr. Derbigny really and truly mean: we know very well, however, what they wish to be understood; their object is to insinuate that the soil of all these things is vested in the people or sovereign of the country in right of absolute ownership; for, they argue exactly as if that position was undeniably proved; but still when they lay down their principles and refer to their authorities, their expressions are so vague and so indeterminate, that if we do not fix them into a close corner, they will have it in their power easily to evade the force of our arguments. But we must bring them to a point.

If you mean only, gentlemen, that the government has a right of sovereignty over these things, which, as Mr. Thierry says* *is merely a sovereignty of protection and conservation*, if you mean that the publick has a right to the use of these things, and that that use is to be *regulated by law*, without, however, otherwise impairing the right of private property; I shall fully agree with you, and there was no need of calling to your aid either the law of nations, the Roman, French or Spanish law to prove a position which nobody meant to contest; in that case you can have no objection to restoring to Mr. Livingston the possession of his Batture, and those whose duty it is to execute the law will take care that he does not obstruct the reasonable use of that property to which the publick are entitled: but if you mean to assert that the law of nations, or the Roman law, or the laws of France or Spain have vested in the sovereigns of countries *the right of property in the soil* of the banks of rivers or of their alluvions, then we are fairly at issue, and I shall not be at much trouble to convince even yourselves of your mistake.

You will recollect, Mr. Derbigny, that it is a conceded point between us, that according to the Roman and the Spanish law, the alluvions of navigable rivers accrue to the individual owners of riparious estates. You, Mr. Thierry, have carried the concession still farther, for you have acknowledged that such has always been the rule even in Louisiana, the edicts of Louis XIV, notwithstanding, and in order to make out the title of the

* "This sovereignty is merely a sovereignty of protection and conservation." M. Thierry page 9, in English.

United States to the Batture, you have been obliged to contend that it is *not an alluvion*, but a *part of the bed* of the Mississippi. Now, gentlemen, in the name of that strong sense by which you are both eminently distinguished, how can you reconcile these two propositions, that by the same system of law, *alluvions* belong to the *individual owners* of the banks of rivers, and that the *banks* of rivers belong to the *sovereign*? If your last proposition is correct, there can be *no individual owners of riparious estates*, for the *bank* of the river, which you say is publick property, will always be interposed between the river and the lands owned by private persons. Why then did you not rest on this ground, to prove that *alluvions* also by the Roman and Spanish laws belong to the publick? Why did you run into the *bed* of the river for an argument, while the *bank* presented you with one, which if your principle is correct, could not have been controverted. You were afraid, I presume, of meeting the positive texts of the law, which forced you into a concession that you could not avoid. But, then, you should at least take care, to make your texts and your arguments agree.

Where are now to be found those *alluvions*, which you have acknowledged to belong, according to the Roman, French and Spanish laws, to the *owners of riparious estates*? Where will you place the riparious estates themselves? You have disposed both of the *bed* and the *banks* of the river, in favour of the *publick*; now show me the space *between them* where we can lodge that species of property called *alluvion*, which you confess to belong to *individuals*. Nay, gentlemen, do not stir from this corner; you are fairly fixed in it, and it is proper that you should remain there. I have something more to say to you.

You have appealed to the law of nations. I do not know what that law has to do with a question of mere municipal jurisprudence, I am willing, however, to meet you on that ground.

You, Mr. Thierry, have referred to Vattel, Wolff and Puffendorff,* as being in favour of your vague propositions, the precise purport and bearing of which I do not yet understand. I cannot, therefore, tell you what those writers *do not* say; that

* Mr. Thierry, page 7, in English

would lead me into too wide a field : but I will show you what they *do* say, and you will find it to be the very reverse of what your argument clearly implies, that the banks of rivers, actually *belong* to the sovereign of the country.

The principles laid down by those writers on the subject of property in rivers and their accessaries, are the following :

1. The *waters* of a river belong to the publick, because they are not susceptible of division, and can only be enjoyed in common.

2. For the same reason, the *bed* of a river, *while the water flows in it*, belongs also to the publick.

3. But if the water should take another course and leave the bed of the river or a part of it dry, the soil which is *so left* becomes the property of the owner of the adjacent estate : the same thing takes place with respect to alluvions.

4. But the property to which the new land is so annexed, must be really adjacent to it ; it must be as the civilians term it, *arcifinie*, that is to say, it must have a natural boundary, such as a river, a mountain, &c. for if between the natural boundary and the land, some other *publick* property should intervene, then the newly-formed soil, belongs of course to the publick or to the government, who are themselves the owners of the immediately adjacent land.

We will prove these positions by the very authors quoted and referred to by our opponents.*

VATTEL, book 1. § 207. The river belongs to the publick, in whatever part of the country it flows : but, the bed being abandoned, half of it is added on each side to the contiguous lands, if they are *arcifinies*, that is having a natural boundary with the right of alluvion.—This bed does *not* belong to the publick ; on account of the right of alluvion possessed by its neighbours, and because here the publick possessed that space only *because the river flowed in it*. But it belongs to the publick, if the adjacent lands are not *arcifinies*.

WOLFF, part 2, chap. 3, § 252. Landed estates are of three kinds : 1st. Those that are not limited by any precise bounds.

* Mr. Thierry, page 9, in English, refers to Puffendorf, Wolff, and Vattel, to prove that the *banks* of rivers, amongst other things, belong to the sovereign or to the publick.

but are only described by the quantity which they contain. 2dly. Those which have fixed artificial limits, that is to say, boundaries made by the hand of man. 3dly. Those which we call *arcifinies*, that is to say, which have natural boundaries, such as rivers, mountains or woods. He who has wished that his estate should be *arcifinie*, is considered as having acquired the right to take possession of alluvions; therefore the right of alluvion belongs to those whose estates are *arcifinies*, and not to others. Consequently, as an estate is not said to be *arcifinie*, if there be between it and the river a publick road, *not due by the estate and a part thereof*, the right of alluvion is not attached to the property of the estate.*

PUFFENDORFF, book 4, chap. 7, § 12. This right, (the right to have alluvions) is presumed to accompany any piece of land assigned to a private person, if in assigning the bounds of it *the neighbouring river is mentioned at large*.

Here, then, Messrs. Thierry and Derbigny, is what you did not expect. The very principles respecting *alluvions*, the main point of this cause, which we have all along contended for, are shown by those high authorities to be the law of the whole civilized world, except where municipal regulations have introduced a different rule, which you have not proved to be the case in Louisiana; and when alluvions are declared to belong to the subjects, because of their property in the *banks* to which they are adjacent, will you still contend that the *banks* themselves belong to the sovereign? How then can an estate be, as your own authors call it, *arcifinite*, or bounded by the river? According to your principle, no riparious estate could be bounded otherwise than by the *bank*, none by *the river itself*.

The reader, I am sure, has already decided the question, if it can be called one. It is surely the strangest assertion that ever was made, that the *soil* of the banks of a river belongs to the government of a country.

I wish Mr. Thierry, among the numerous authorities which he has cited, had produced one to show at what *precise point* of the bank of a river, private property begins, and publick pro-

* Therefore if we have proved that the road which fronts the Gravier's estate is merely *due by it*, that is to say is merely a *charge upon it* and is *a part of it*, our right to the Batture on the above principles cannot be contested.

perty ends. Is it determined by a real or an imaginary line, and in either case, where is that line to be placed?

The fact is, that, as I have shown in my reply to Mr. Derbigny, the authorities go no further than to prove that the publick have a right to the *use* of the banks of a river, for the necessary purposes of navigation, fishery, &c. that that use is to be regulated by law, and that the owner of the soil is to do nothing on the land that may impede it. Yet that general principle does not go so far as to imply that an owner of riparious land may not erect works on the bank of the river on which his estate lies,* not in order to *obstruct* but to *facilitate* its publick use for the purposes above mentioned; nor that if such a landholder has been at great expense in constructing wharves or landings on his property, every one has a right to enjoy the benefit of his industry, without making him any compensation for it. Such a construction of the law would be too absurd, and would be contrary to what is known to be the notorious practice even in countries governed by the civil law.† But be this as it may, it is a matter of local consideration, in which the United States have no concern; the people of the Orleans Territory have a legislature which is competent to every object of domestick regulation. Nor has this any thing to do with Mr. Livingston's or the United States' *right of property* in the Batture, which is the only point that we are called to consider.

* *In litore, jure gentium, ædificare licere, nisi usus publicus impediret.* By the law of nations, it is lawful to erect buildings on the shore, provided the publick use thereof be not impeded. Dig. L. 43, Tit. 9, L. 4.

† The legislature of Orleans, has, however, lately passed a law by which any one who shall be convicted of having received any compensation for the *landing of any embarkation before his land* (by which I suppose they mean *wharfage*) is to be fined in a sum *not less than five hundred dollars*. 3 Orleans Laws, 6, 7. A strange law, this, which compels a man under a heavy penalty to give away to others the hard earned fruits of his labour and expense! So blind and so violent is party spirit! It is to be hoped that this *immoral* statute will soon be expunged from a code in which it never ought to have had a place.

THIRD PROPOSITION.

That according to the civil law, alluvions accrue only to the owners of country estates, and not to the owners of city property.

Thanks to Mr. Thierry, the *Batture* is again an *alluvion*. It has undergone many changes in the course of his discussion.

I have nothing to say on this point but that the civil law absolutely says nothing of what Mr. Thierry states. He amuses himself with quibbling upon the Latin word *prædium*, which is frequently used by the authors of the digests in their illustrations of the doctrine of *alluvions*. Mr. Thierry pretends that the word *prædium* only means a *country estate*, though he quotes an authority, page 28, in English, which proves that it may also mean city property, (*prædium urbanum*.) But let it signify what it may; because the civilians in the examples by which they have illustrated the principles which regulate the law of alluvions, may have instanced a *field* or a *farm* and not a *house in town*, does it follow that alluvions do not accrue to the owners of city property? Surely such an argument does not require a serious refutation.



FOURTH PROPOSITION.

That Mr. Gravier, having alienated the front lots of the suburb St. Mary, the right to alluvions being accessory to the principal estate, is gone along with it.

If Mr. Gravier has alienated those front lots to individuals, it is merely a question between him and them, and the United States have nothing to do with it; if to the publick or to the government, Mr. Thierry must produce the conveyance.

But Mr. Thierry means that the existing *Batture* has entirely arisen since the time when Mr. Gravier erected his estate into

a suburb, and upon the principle that alluvions do not accrue to the owners of city property, and also upon his vague doctrine that sea-ports belong to the publick, he contends that it has accrued only for the publick benefit. This is the reason which has induced him to make that famous concession of six acres of Batture annexed to the Gravier estate since 1763, for which Mr. Derbigny has found so much fault with him. Those six acres he says, must have exhausted all the Batture that had accrued between 1763 and 1788, when the first plan of the suburb was made; of course, therefore, at the latter period no Batture whatever remained, and all that has been formed since must belong to the publick.

Mr. Derbigny himself has taken the trouble to answer this argument. "You have," says he, "brought the cause to this point that we must prove that no Batture existed at the time when the Gravier estate was converted into a suburb, or we are left without resource. But the contrary fact is too well proved.* I shall therefore leave Mr. Thierry to settle this matter with his colleague, and make no further answer to this argument.

Before I conclude I must give a short answer to some arguments which are thrown out *ad captandum*, in the works of Messrs. Thierry and Derbigny. Those arguments have absolutely nothing to do with the present question; but as they are intended to make unfavourable impressions against Mr. Livingston and his cause, it is proper that they should be noticed.

In the first place it is said, that if the Batture is restored to Mr. Livingston, he will immediately remove his dyke to the edge of that alluvion ground, and by that means will leave it exposed during the heats of summer, when it would otherwise be covered with water, to the action of the rays of the sun, which will occasion putrid exhalations, by means of which the country and city will be subjected to pestilential disorders.—It is said also, that the works which Mr. Livingston has already begun and intends to complete on the Batture when it shall return into his possession; will alter the course of the river Mississippi, and be productive of incalculable mischief to the country.

* See his newspaper publication, Appendix No. II.

I answer, that by an act of the legislature of the Orleans Territory, passed on the 18th of February 1803, no person is allowed to make a new dyke or embankment in front of those which at present exist, without the authorization of a jury of twelve freeholders, and that the same law prohibits under very severe penalties, the making on the shores of any river within the Territory, any work tending to alter the course of its waters, increase their rapidity, or render its navigation more difficult.* The law of the country has therefore sufficiently provided for every danger of that kind, and if any further provision should be required, the same legislature is competent to make it.

But these are mere bugbears, which, we are warranted to say, are not founded on facts or on any reasonable probability. On the contrary, we can prove, that the works which Mr. Livingston had begun and intended to complete, at the time when he was deprived of the possession of the Batture, will, when finished, be productive of the greatest advantage not only to the inhabitants of the Orleans Territory, but to the people of the western country who trade with them. They will afford convenient births for ships and vessels during the time of the inundations and greatly facilitate at all times the lading and unlading of merchandize, without the expense of cartage.—See appendix No. IV.

It is said, moreover, that the Batture is the only place convenient to the city of New Orleans, from whence the inhabitants can procure earth and sand, for building their houses, filling up their streets and yards, and for other necessary purposes. If that were true it would not be a reason for depriving Mr. Livingston of his property, and in that case, the inhabitants instead of getting earth and sand for nothing, would have to purchase it of the owner of the ground; but this allegation can also be disproved; and it can be made to appear that the corporation themselves possess other Battures at a convenient distance from the city, from whence they can procure the necessary materials, and in fact *did procure them* while Mr. Livingston was in possession of his alluvion.—See appendix No. III.

And lastly a variety of imputations have been cast on the character of Mr. Livingston in the course of this business, with a

* See Orleans Laws, vol. 3, page 2.

view to render him odious to the publick and to the government. He has been styled a disturber of the publick peace.* It has been surmised that he had acquired his title to the Batture by an unlawful combination with John Gravier, that he had disbursed no money for it, and had bound himself to pay the sum agreed upon only in case his claim should succeed. These assertions Mr. Livingston peremptorily denies and declares to be false and calumnious. He has published a full answer to them in the Orleans Gazette, of which I have extracted the most material part, and annexed it to this publication; in order that he may be heard himself in his own defence, and put down his adversaries by a *plain tale*.†

APPENDIX.

No. I.

Deliberation of the City council of New Orleans, in their session of the 19th of October, 1808.

HAVING considered the manuscript addressed to the city council by Mr. Thierry, entitled: *Examination of the rights of the United States, and of the pretensions of Edward Livingston, Esq. to the Batture in front of the suburb St. Mary*, the council has resolved *unanimously* that the said *memoire* or examination, with the documents thereto annexed, be printed in English and French to the amount of five hundred copies, at the expense of the city, to be transmitted to his excellency the President of the United States, and to the members of Congress, and to be distributed to the officers civil and military of this territory.

M. BOURGEOIS, *Secretary to the council.*

Approved, 22d of October, 1808.

JAMES MATHER, *Mayor.*

* See ante.

† See appendix No. V.

No. II.

Translated from the Moniteur de la Louisiane, 18th Nov. 1808.

I have read with a great deal of interest the *memoire* of Mr. Thierry, on the rights of the United States to the Batture of the suburb St. Mary, and I give, with pleasure, this publick testimony of the satisfaction which it affords me, although he has spoken in it, rather with too much levity of the opinion which I gave last year, on the subject of that controversy. But I cannot help regretting that he has *dared* to put aside, *in six lines*, several of the principal arguments, which, whatever he may say, may be used against Mr. Gravier with the greatest success.

A little more regard for the opinion of those who had settled those arguments, on mature consideration, aided by some degree of professional knowledge, would have made him avoid that excess of confidence in his own strength, the consequences of which would be unfortunate, if he were a lawyer by profession.

The question of publick law, *the only resource* which M. Thierry has reserved to himself, does undoubtedly afford a powerful ground of argument, which he has discussed in a manner which does him honour. It is unfortunate, that after having laid it on a very good foundation, he has himself laboured to destroy his own work, by *admitting* that the Graviers and those under whom they claim, "have constantly enjoyed the right of taking possession successively of those portions of Batture, which the consolidation of the soil permitted them to annex to their property." If that were true, no resource would remain against Mr. Gravier, but to prove that at the time of the establishment of the suburb, there was no portion of the Batture sufficiently consolidated to be susceptible of being thus incorporated with their estate; *but the contrary has been ascertained*, and it is probable that it may still be proved. In this manner, the rights of the United States, instead of resting on several solid grounds, would have but a very precarious existence, which would depend on the more or less correct understanding of a *nice definition*.

I hope very soon to prove, that the United States are owners of the Batture, by more than one title, and I have the confidence

to believe, that the vain boasting with which Mr. Livingston's writings are replete, will be covered with the ridicule that it deserves.

P. DERBIGNY.

MR. THIERRY'S REPLY.

Translated from the Courier de la Louisiane of the 21st November, 1808.

Mr. Derbigny has greeted the *memoire* which I have just published concerning the Batture cause, with observations which place me in a rather embarrassing alternative.

On the one hand, not to refute Mr. Derbigny's assertions would be in some measure to acknowledge that they are correct and well founded; on the other hand, it would be a violation of every rule of propriety, were I to enter into a discussion, which could not but be highly flattering to our adversaries; although, in reality, it could not impair the justice and goodness of the cause which we have undertaken to defend.

I must then content myself with observing to Mr. Derbigny, that he is unpardonable for having mutilated the only quotation which he has extrated from that *memoire*, by making me say, page 36, that the Gravieres and those under whom they claim, "had constantly enjoyed the right of taking possession successively of the portions of the Batture which the consolidation of the soil permitted them to annex to their property," and to convince him of his want of exactness, I dare hope, that he will not take it ill, that I request him to read a little more attentively the page which he has quoted.

THIERRY.

No. III.

Translation of a certificate of Mr. Lafon, deputy surveyor general for the county of Orleans.

I, the subscriber, certify that the portion of land outside of the levee, commonly called Batture, situate between the suburb

St. Mary and the place where ships lie; which Batture fronts the fort St. Louis, and is *possessed by the town of New Orleans*, contains two thousand superficial toises, which may be dug to the depth of four feet before coming to the level of the low water; that this portion increases every year by the alluvion of the river, and that the earth which may be taken out of it in the course of one year is always replaced by the deposit of the river in the next.

I am also of opinion, that this parcel of Batture together with that of Bernard Marigné, now the property of the city, and that which lies opposite fort St. Charles, can furnish a sufficient quantity of earth for the present use of the city.

LAFON.

New Orleans, 20th September, 1808.

Ordinance of the City Council of New Orleans.

On the repeated complaints of many citizens, that they are obliged to buy the earth necessary for building and filling up their yards, and for constructing their banquettes, and that a great number of them have not even the means adequate to this disbursement: the city council considering that it is incumbent on them to bring some relief to the painful situation of the inhabitants of the city in this occurrence:

Resolve, That notwithstanding the works already commenced by the corporation, and the momentaneous detriment by which the interests of the city, and part of the commerce shall be affected, the mayor is provisionally authorized to cause that the earth from the *Batture opposite fort St. Louis*, be delivered *gratis* to all proprietors of lots and houses in town and the fauxbourg St. Mary, who may be able to prove the indispensable necessity of this relief.

(Signed)

CHARLES TRUDEAU, *President.*

Approved, 15th October, 1807.

JAMES MATHER, *Mayor.*

(Certified.)

M. BOURGEOIS, *City Clerk.*

No. IV.

We the subscribers, captains of vessels now lying in the port of New Orleans, do certify, that we have examined the canal constructed and nearly completed, by Edward Livingston, Esq. on the Batture of the suburb St. Mary, and we are of opinion, that the said canal when completed will be of the greatest use to commerce, by affording a convenient birth for ships and other vessels, and that similar canals, constructed along the whole front of the said suburb, particularly when stores shall be erected on the sides, will greatly facilitate the lading and unlading of vessels without the expense of cartage. And we are further of opinion, from examining the current of the river at high water, that the said canals will not render the current more rapid, or the harbour more inconvenient or less secure, but on the contrary will afford both convenience and safety to the shipping.

(Signed by a number of masters of vessels.)

 No. V.

Extract from a publication of Edward Livingston, Esq., inserted in the Orleans Gazette of November 16, 1807.

“My interest in the prosecution is next seized on as a proof that I bargained for the possession of a doubtful title. Let facts answer this charge. On my arrival, John Gravier was in possession; the property was offered for sale; several lots as I have before shown, had been disposed of long before. And prior to my becoming interested, Mr. Daniel Clark, and Mr. Benjamin Morgan, the latter then a judge of the city court, now, or late, a member of the city council, had agreed for the purchase of the same quantity which I afterwards bought, at the same price.—Mr. Clark’s leaving the city and neglecting to give directions for the payment, was, as he has since informed me, the only reason why the bargain was not completed.

“The known judgment and prudence of these gentlemen—particularly Mr. Morgan, who lived in the suburb and must have

known the title of the city, if any existed, might also have had some influence on my desire to acquire this property; and some months after my arrival I commissioned Mr. Delabigarre to purchase it on our joint account. He contracted for two thirds (excepting one square) at the price of ten thousand dollars. The contract was made in Mr. Delabigarre's name, and I entered into an obligation to pay the one half of the purchase-money as it became due; and this paper is now in the hands of his executors. After executing this agreement the corporation persisted in asserting a right to dig the soil in question, and Mr. Gravier applied for an injunction to quiet him in his possession, and to enable him to complete his contracts for the sale. The result is known to the publick.—His title was declared to be good—he was quieted in his possession; and a perpetual injunction granted against the defendant's pretensions. After this judgment had been signed, executed and acquiesced in for several months, relying on it as an incontrovertible title, I enlarged my purchase to the amount of 77,000 dollars; a very considerable portion of which I have paid, without any resource in case of eviction, as may be seen by reference to the conveyances made to me in the publick offices.

The interest I had, therefore, was fairly acquired from a person who was then exercising the most evident act of ownership, by inclosing his land; whose ancestor had by four publick recorded sales, disposed of parts of it; whose title was supposed so good by two of the most prudent men in the country, that they had treated and concluded on the terms of purchase, and against which the only claim then set up, was that of a servitude or commonage, a claim not inconsistent with a right in the proprietor to dispose of the soil. Which of those who dare now to reproach me for this transaction, would not have done as much? Many of them have, as I can show, done more; and there are few who would not have gladly participated in my contract, if they could have foreseen the prodigious increase that has taken place in the value of this property. How far regret at having lost so fair an opportunity of increasing their fortunes, may influence their present conduct, it is not material to consider.

On the several arguments in this cause, the claim of the city was ably and zealously defended, by counsel of the first talents in the territory. By a very happy combination, they had united in

their service, the first law officer of the local government,* a gentleman educated in, and familiar with the principles of the common law; Mr. Moreau, whose long practice in one of the French colonies had made him perfectly master of the imperial jurisprudence; and Mr. Derbigny, who to a very respectable standing at the bar, joined the advantage of a ready use of the Spanish language, in which the records were kept, and in which many of our authorities were to be sought; two other counsel, Mr. Alexander and Mr. Keene, had been engaged by the corporation; the first of these gentlemen assisted in preparing the defence, but was absent during all the arguments; the latter attended only the two first.

With this weight of genius and acquirement, with the popular interest, and of course the popular opinion on their side, with the activity of hundreds quickened by interest in their researches for evidences, with the funds of a wealthy city at their command, a perfect knowledge of their opponent's title and his arguments in its support, with the delay of two years to collect their witnesses, produce their papers, and arrange their authorities; and above all, with the inestimable privilege of having their own declarations heard in evidence, and declared to be credible proof; with all these advantages on their side, this cause was argued at three different periods, was deliberately considered, and UNANIMOUSLY decided so much to the conviction of the defendants, that they have since deliberately resolved that they never had a title. And yet men are found among them who complain that justice has not been rendered them in the conduct of the cause; they complain of the wiles of chicane! they speak as if their learned counsel could have been over-reached, as if the bench had been deceived:—I dare boldly appeal to the judges, to the whole bar, to all who heard the cause; none of them will deny that from the commencement to the end of the suit, it was conducted with a liberality that bordered on imprudence; that even before the legislatures had made the corporators witnesses, I offered, in open court, to permit the examination of all the defendants, from the mayor down to the scavenger, if they would proceed in the cause.

That on the subsequent hearings, not only the inhabitants of the town, but members of the common council, and even the re-

* The late Mr. Gurley.

order of the city, were produced and sworn as witnesses in their own cause; that their own minutes were read, their own acts produced, and that the only instances of the rejection of evidence, were the cases of Mr. Caisieurgue and Mr. Reano who, though examined to other points, were not permitted to declare the reasons which induced the cabildo to pass a particular act; on the obvious ground that the act must speak for itself, and that, though they might declare the reasons for their own vote, it was impossible for them to know those which influenced others.

I know that I should offend the delicacy of the respectable judges who have given this opinion, should I, in this manner, attempt to vindicate the motives of their decision; their characters are infinitely removed beyond the reach of those factious calumnies that have assailed them; yet they will, I hope, permit me one reflection which is important in the course of this address.

The more importance that is attached to this cause, the more the publick interest is alleged to be wounded by its decision; so much the more incontrovertible the title of the plaintiff must have appeared to the bench; for it can not be supposed that without a right so clear as to exclude all doubt, a most valuable property would be adjudged to an individual, in opposition to a publick claim. And without imputing any unworthy influence of popular opinion, I can readily believe that the consequence which was falsely given to this cause, produced a hesitation and delay which was not created by any difficulty in its decision. Popularity, with a probability of legislative and executive favour, every thing that could bias a man whose principles were not unshaken, were offered on one side; the other did not even present those personal attachments which have been made the basis of an impotent calumny.—Nay, by a very singular concurrence of circumstances, Gravier, the plaintiff in the cause, was, during its pendency, indicted for a contempt of the court, Delabigarre was known to be the author of a libel on the administration of justice, for which the printer had been presented, and I myself, in the publication to which I before alluded, had spoken of the conduct of a majority of the bench, in a manner certainly not calculated to conciliate their friendship. I had written with a warmth which I thought, and still think, the occasion justified; but the fear of a false construction of my motives, shall not prevent my

acknowledging that subsequent explanations have convinced me of the perfect purity of their intentions.

Thus, if personal resentment could have existed on the bench, it would have been gratified in giving a decision contrary to Gravier's claim.

But the cause, says the voice of publick clamour, the cause was tried by the court, without the intervention of a jury. None but the grossly ignorant, or the perversely wicked, can make this a ground of accusation against the plaintiff. The trial by jury in civil cases, is a privilege which by the laws of the territory either party may claim at their pleasure. When neither demand it, the privilege is of course waived. Here the defendants have not even inadvertence to plead; the mode of trial was a matter of deliberation and choice, for I have seen the draft of an affidavit which Judge Moreau, the defendant's counsel, told me he was about to make, in which he gives a reason why they did not chuse to ask one, and this reason, if I recollect aright, was, that they apprehended they would not be permitted to have a jury composed of inhabitants of the city, (that is to say, of the parties to this cause.) What would have been said of the defendants, if they had testified even a desire to have persons interested in their purchase, not only examined as witnesses, but sworn as jurors in the cause? Nothing indeed could have been added to the obloquy which has been cast upon them; but if such had been their conduct, I should candidly confess, there is little of it they would not have deserved.

DEBATES ON THE CONSTITUTION.

Extract of the notes made by the late Chief-Justice Yates, one of the representatives of the state of New York, in the Convention of the United States, in 1787, copied from the original manuscript of the said chief-justice, by the chancellor of the said state, John Lansing, junr. and certified by him to be a true copy of the said notes.

"THE representatives from the different states having met on the 25th of May, 1787, at the state-house in Philadelphia, General Washington having been unanimously placed in the chair, and Major Jackson, by the votes of all the states, except Pennsylvania, appointed secretary; the convention proceeded to read the powers given by the different states to their delegates, among which were particularly noticed the power of Delaware, which restrained its delegates from assenting to an abolition of the fifth article of the confederation, by which it is declared 'that each state shall have one vote.'

"The 28th, his excellency Governour Randolph, a member from Virginia, got up, and in a long and elaborate speech, showed the defects existing in the federal government then in existence, as totally inadequate to the peace, safety, and security of the confederacy, and the absolute necessity of a more energetick government.

"He closed these remarks with a set of resolutions, fifteen in number, which he proposed to the convention for their adoption, and as leading principles whereon to form a new government. He candidly confessed, they were not calculated for a federal government. He meant a strong consolidated union, in which the idea of states should be nearly annihilated.

"Mr. C. Pinckney, a member from South Carolina, added, that he had reduced his ideas of a new government to a system which he read, and confessed that it was grounded on the same principle as those resolutions.

" The 2d of June, 1787, Mr. Randolph displayed the views of the plan of Virginia, with respect to the executive branch of the union. He proposed the establishment of a directory of three—dividing the states in three divisions, and taking an executive from each, chosen by the people and invested with extensive power. The idea was rejected by almost all the other delegates, and the principle of a single executive adopted.

" Mr. Madison, from Virginia, endeavoured to support the plan of that state in all its branches, and after a speech pronounced by Mr. Reed, to prove that the state-governments must sooner or later be at an end, and that therefore it was the duty of the convention to make the new national government as perfect as possible; he gave it as his opinion that when the convention agreed to the first resolve of having a national government it was then intended to *operate to the exclusion of federal government*, and that the more extensive the basis was made the greater would be the probability of duration, happiness and good order.

" Mr. James Wilson, from Pennsylvania, opposed the annihilation of the state-governments, and he represented that the freedom of the people and their local and internal good police depended on their existence in full vigour, and that it was not possible that a general government as despotick even as that of the Roman emperours, could be adequate to the government of North America.

" Mr. King, in the course of these debates, did not show himself averse to the state governments, but on the contrary, in opposition to Mr. Madison, who wanted the new constitution to be accepted by the people at large, he observed that as the people in every state, had tacitly agreed to a federal government, the legislature in every state had a right to confirm any alteration or amendment in it, and he supposed that the most eligible mode of approving the constitution would be a convention in every state.

" The 8th of June, Mr. C. Pinckney having moved that the National Legislature should have the power of negating all the laws passed by the state legislatures, which they may deem improper, he was warmly supported by Mr. Madison, who insisted

that the unlimited power in the general government of negating the laws passed by the state governments was absolutely necessary—that it was the only attractive principle which would retain the centrifugal force, and that without it planets will fly from their orbis.

“ Mr. Gerry observed ironically, that he was not willing to take such a leap in the dark, and recommended to designate the power of the National Legislature, to which the negative ought to apply. Mr. Madison insisted, that nothing but the proposed system could restore the peace and harmony of the country.—Mr. Pinckney’s motion was lost, seven states against, and Virginia, Pennsylvania, and Massachusetts for it.

“ The 9th of June, the convention being engaged in the discussion of the right of suffrage by the number of inhabitants and not by states, Mr. Wilson having moved that the mode of representation of each of the states, ought to be from the number of its free inhabitants, and of every other description three-fifths to one free inhabitant, Mr. Madison agreed to fix accordingly, the standard of representation.

“ On the question to fill up the blank of the duration of the first branch of the National Legislature, Mr. Madison was for three years, though Mr. Gerry was afraid that the people would be alarmed at that clause savouring of despotism.

“ On the motion to fill up the blank of the duration of the second branch of the National Legislature, Mr. Madison was for seven years—and declared, that considering this branch *as a check on democracy*, it could not be too strong.

“ A plan opposed to the Virginia plan supported by Mr. Madison, having been presented by Mr. Patterson, the purpose of which was merely to amend the old confederacy, Mr. Madison attempted to have it rejected in toto; but Mr. Hamilton prevented it, and said, that he was not in sentiment with either plan—that he supposed both might again be considered as federal plans, and being both fairly in committee be contracted so as to make a comparative estimate of the two.

“ The 16th of June, Messrs. Lansing and Patterson, exposed all the inconveniences of the Virginia plan, and its dangerous tendency, after which Mr. Wilson stated as follows the two plans:

VIRGINIA

Proposes two branches in the Legislature.

The Legislative power derived from the people.

A directory first, and by amendment a single executive.

The legislature to legislate on all national concerns.

The legislature to have the power of negating all the state laws.

JERSEY

A single legislative body.

Legislative power derived from the state.

No provision for the executive.

The legislature to legislate only on limited objects.

The executive to have the power to compel obedience.

“ Mr. Hamilton’s ideas were materially dissimilar to those two plans, and in an eloquent speech stigmatized them both. He did not approve the total abolition of the state-governments, but he wanted to reduce them to simple corporations, with very limited powers. He did not think that a federal government could suit this country ; but still he pretended that he was at a loss to know what could be substituted for it ; a republican form of government could not be perfect. But he would hold it, however, unwise to change it, though he considered the British form of government as the best model that the world ever produced. He wished that the convention could go the utmost length of republican principles, and thought that they would not deviate from it if they made the chief magistrate of the republic elective for life, and gave him the power of negating all laws, of making war and peace with the advice of the Senate, and the sole direction of all military operations, &c. &c. He proposed also to appoint in each state an officer, to have a negative on all state-laws. He confessed that his plan and that from Virginia were very remote from the ideas of the people, and he admitted explicitly, that the Jersey plan was nearest to their expectations. He described the Virginia plan as being nothing but democracy, checked by democracy, or *pork still, with a little change of the sauce !* ”

“ Mr. Madison did not relish at all the criticism of Mr. Hamilton, and in a long speech vindicated the Virginia system, and attempted to demonstrate its superiority over the Jersey plan.

* On a motion of Mr. King, the Jersey plan was rejected as inadmissible, seven states against it and four for it, including New York.

" The committee then rose and reported again the Virginia plan.

" Mr. Wilson, on the first clause, represented, that it was not a desirable object to annihilate the state-governments.

" Mr. Hamilton corrected what he had said against those governments ; but intimated that they ought to be reduced to a smaller scale.

" Mr. King observed, that none of the states could properly be called sovereign, being deprived of several sovereign rights, such as making peace and war ; and that in reality the consolidation had already taken place by the articles of confederation.

" To compromise matters between the Virginia and the Jersey plan, Dr. Johnson, proposed, that the state-governments should be preserved, with some modification ; and that the states, in their legislative capacity, should have the right to appoint the second branch of the National Legislature, in order to unite them with the general government.

" Messrs. Ellsworth and Johnson, spoke in favour of that modification, and observed that the state-legislature were more competent to make a judicious choice than the people at large for the second branch, where wisdom and firmness were wanted.

" Mr. Madison opposed that idea, and for his part, he persisted to apprehend the greatest danger from the state-governments ; and he declared, that he was always inclined for a general government emanating from the people at large, and independent of any local authority. Finding, however, that the majority was against him, he proposed a postponement ; but it was negatived, and the clause proposed by Dr. Johnson adopted.

" Mr. Madison, on the sub-question relative to the organization of the Senate, and the rotation in that branch, said, we are acting in the same manner as the confederation ; and by the vote already taken, the temper of the state-legislatures will transfuse into the Senate.

The 26th of June, on the question of the continuance of the senators in office, the same Mr. Madison gave it as his opinion, that the longer the senators remain in office, the better it will be

for the stability and permanency of the government. Several members thought differently on that question, and proved that the longer the senators resided at the seat of government, the more they would become naturalized to its climate and habits ; that they might even settle there, and forget their own state and its interest.

“ The 26th, on a motion to strike out the clause declaring, that the senators of the union should be ineligible to any state office ; Mr. Madison opposed it, and observed, that Congress had heretofore depended on state-interest, and that the convention was now pursuing the same plan. He was contradicted by Messrs. Pinckney and Butler, who observed, that the state and general governments must act together ; that the Senate, or second branch, was the aristocratick part of our government, and that they must be controlled by the states.—The motion for striking out was carried.

“ The following motion was made by Mr. Lansing, of New York :—That the representation of the second branch be according to the articles of confederation, that is to say, on federal principles of equality. A debate took place, in which Mr. Madison, supporting the Virginia plan, declared that the representation must not be on federal principles, but relative to the number of inhabitants. He was answered by several members, but particularly by Dr. Johnson, who observed, that the idea of destroying the state-governments having been over-ruled, the convention was to frame a government, not for the people of America, but for the political societies called states, which compose the union ; and that they must, therefore, have a voice in the second branch, if it was meant to preserve their existence, the people composing already the first branch.

“ Mr. Madison rose up against Dr. Johnson in defence of the Virginia plan, and supported the following dogmas ; “ that there is a gradation of power in all societies, from the lowest corporation to the highest sovereign ; that the states never possessed the right of sovereignty ; that they were only corporations having the power of making by-laws ; that they ought to be still more under the control of the general government, at least as much as they were under the King and British government.

" Mr. Hamilton, without adopting the ideas of Mr. Madison, spoke against the motion of Mr. Lansing, which was lost, four states for and six against it.

" Judge Elsworth then moved, as an amendment to the plan of Virginia, that in the second branch each state should have an equal vote: equality of votes being the principle on which all confederacies are formed.

" Mr. Madison refused to compromise, and exclaimed that the greatest danger for the general government would arise from the opposition of the northern interest of the continent to the southern interest: alluding to certain expressions of several members leaning towards a division of the union, if Mr. Madison's plan was not modified.

" Dr. Franklin recommended a compromise on that subject, and made, in his usual way, the following comparison: " when a joiner wants to fit two boards, he takes off with his plane the uneven parts from each side, and thus they fit: let us do the same, said he, and as an expedient he proposed, that the Senate be elected by the states equally." But Mr. Madison, considering, that by his plan the Senate was to be the greatest engine by which all the state-laws could be reversed and annulled, would consent to no arrangement that would deprive the large states of having in both branches a weight proportioned to their population.

" Mr. King recommended moderation, and was in sentiment with those who wished the preservation of the state-governments. The general government, in his opinion, could be constructed so as to effect that object. The new constitution must be considered as a commission under which the general government is to act, and as such be the guardian of the state-rights. Five states voted for the amendment, and five against it, and one state was divided, and the amendment proposed by Mr. Elsworth was lost.

" The 2d of July, General Pinckney moved for a select committee, to take into consideration both branches of the legislature. Divers opinions were presented, among which Gouverneur Morris suggested the propriety of rendering the Senate an absolute aristocracy, representing large property combined with distinguished talents.

“ Mr. Madison opposed the appointment of a committee—he thought it would delay the business ; and if appointed from each state, would contain the whole strength of state-prejudices. A committee notwithstanding was appointed from each state.

“ The 3d of July the committee met, and agreed on the following report, on condition that both propositions should generally be adopted :

“ 1st. That in the first branch of the legislature, each of the states be allowed one member for every 40,000 inhabitants, of the description reported in the seventh resolution of the committee of the whole house—that each state not containing that number shall be allowed one member—That all bills for raising or apportioning money and for fixing salaries of the officers of government of the United States, shall originate in the first branch, and shall not be altered or amended by the second branch—and that no money shall be drawn from the publick treasury but in pursuance of appropriation to be originated by the first branch.

“ 2dly. That in the second branch of the legislature of states, each state shall have an equal vote.

“ Mr. Madison said he restrained himself from animadverting on the report from the respect alone which he bore to the members of the committee.”

Here end the notes of Mr. Yates. He left at that period, with Mr. Lansing, the convention. They had both uniformly opposed the Virginia system, and despairing of rendering any real service to their country, and to the state who had sent them, they left the convention and returned no more.

Substitute, proposed by Mr. Leigh, of Dinwiddie, Virginia, to the preamble and resolutions, on the subject of the right of the state-legislatures to instruct their senators in the Congress of the United States.

The general assembly of Virginia, having at the last session, after mature deliberation on the subject, and under a solemn conviction that the institution of the Bank of the United States was unconstitutional, instructed the senators of this state in Congress, to oppose the renewal of the charter of that bank; it has since seen, with mingled regret and displeasure, the authority of its instruction denied by one senator and disobeyed by the other.

No man, however exalted by station or character, could be so considerable as to excite the resentment of this assembly—a resentment unworthy its own dignity, and in a manner honourable to its object: it will never descend to inflict personal injury or insult on any individual; it is withheld at once by its justice, its benignity and its pride, from indulging in itself, or exciting in others, the spirit of persecution or revenge; least of all, can it ever be so devoid of self-respect, as to enter into an altercation with its own servants. But, under present circumstances, when a right of vital importance, the prostration of which might ultimately affect the existence of the state-governments, the balance of the constitution, and the integrity of the union, is openly questioned and denied, if this assembly were to pass the subject over in silence, it might, perhaps properly, be inferred, that it retracted from its claim of right in humble submission, or abandoned it as an idle, or yielded it as an unjust, pretension.

Whether the general assembly has been guilty of an act of usurpation, or its senators of culpable disobedience, let the world judge. This assembly will never disdain to give the reasons of its conduct.

There can be no doubt, that the scheme of a representative republick, was derived to our forefathers from the constitution of the English House of Commons; and that that branch of the English government, whatever it be now in practice, was in its origin, and in theory always has been, purely republican. It is

certain too, that the statesmen of America, in assuming that as the model of our own institutions, designed to adopt it here in its purest form, and with its strictest republican tenets and principles. It becomes, therefore, an inquiry of yet greater utility than curiosity, to ascertain the sound doctrines of the constitution of the English House of Commons; in regard to this right of the constituent to instruct the representative. For the position may safely be assumed, that the wise and virtuous men, who framed our constitution, thoroughly versed, as they undoubtedly were, in the English doctrines of representation, designed, that in the United States, the constituent should have at least as much, if not a great deal more influence over the representative, than was known to have existed, time immemorial in England. Let us then interrogate the history of the British nation: let us consult the opinions of their wise men.

Instances abound in parliamentary history of formal instructions from the constituents to the representative, of which, though doubtless a stricter search would disclose many more, the following may suffice:—In 1640, the knights of the shire for Dorset and Kent, informed the commons, *that they had in charge from their constituents*, seven articles of grievances, which they accordingly laid before the House, where they were received and acted on. In the 33d year of Charles II. the citizens of London instructed their members to insist on the bill for excluding the duke of York (afterwards king James II.) from the succession to the throne; and their representative said “that his duty to his electors obliged him to vote for the bill.”—At a subsequent election, in 1681, in many places, formal instructions were given to the members returned, to insist on the same exclusion-bill: we know, from history, how uniformly and faithfully those instructions were obeyed. Instructions are still extant, on the subject of the relations between England and France in 1701. The peace of Utrecht gave occasion, in 1714, to numerous instructions from various parts of England: those of London, particularly, are in the most authoritative tone. In 1741, the citizens of London instructed their members to vote against standing armies, excise-laws, the septennial bill, and a long train of evil measures, already felt or anticipated; and expressly affirm their right of instruction—we think it (say they) our duty as it is our

undoubted right, to acquaint you, with what we desire and expect from you, in discharge of the great trust we repose in you, and what we take to be your duty as our representative," &c. In the same year, instructions of a similar character were sent from all parts of England. In 1742, the cities of London, Bristol, Edinburgh, York and many others instructed their members in parliament, to seek redress against certain individuals suspected to have betrayed and deserted the cause of the people. And in 1769 the city of London instructed its members to guard with watchful diligence, the trial by jury, the *habeas corpus* act—and on various other points.—It will be remarked, that some of the instances above quoted relate to points of constitutional law, and some to those of policy, and that most of them occurred about or since the revolution in 1688, at which time, and by which event, the English politicians tell us, their constitution was settled, the rights of the people ascertained, and the powers of every branch of their government limited and defined.

Instances are also on record of the deliberate formal acknowledgment of the right of instruction by the House of Commons itself, especially in old times. Thus the commons hesitated to grant supplies to king Edward III, till they had the consent of their constituents, and desired that a new Parliament might be summoned, which might be prepared with authority from their constituents. Passing by other ancient precedents, one more instance shall be added, occurring in modern times, in the purest era of the English constitution, the reign of William III, of an acknowledgment by the English commons (in substance at least; if not in terms) of their absolute dependence on their constituents; it will be found in the proposed remonstrance of the commons, on the occasion of the king refusing his assent to the bill for free and impartial proceedings in parliament. Moreover, we are informed by authentick history, that formerly "when the commons gave their answer touching the subsidy demanded for the wars, they desired leave to return into the country, to confer with their neighbours:" and again, that the commons "often refused to agree to propositions from the court, for this reason only, that they could not, till they went home and consulted with their constituents."

"Instructions (says a member of the House of Commons) ought to be followed implicitly, after the member has respectfully given his constituents his opinion of them: far be it from me to oppose my judgment to that of six thousand of my fellow-citizens."—"The practice (says another) of consulting our constituents was good. I wish it was continued. We can discharge our duty no better, than in following the direction of those who sent us hither. What the people choose is right, because they choose it."—It were an endless labour to collect a catalogue of illustrious statesmen, the wisest and best England ever saw, who have, from time to time, publicly subscribed to these opinions: but it were impossible not to single out the name of *Russel*, who is particularly recorded to have acceded to the sentiment last quoted.

Without referring to the minor political authors, who are without number, as they are without fame, who have maintained these positions (quoted from one of them)—"that the people have a right to instruct their representatives—that no man ought to be chosen that will not receive instructions—that the people understand enough of the interests of the country, to give general instructions—that it was the custom formerly to instruct all the members, and the nature of deputation shows that the custom was well-grounded."—It is proper to mention, that the great constitutional lawyer Coke, though he flourished in the days of Queen Elizabeth, (whose attorney-general he was) when prerogative was stretched to its uttermost bounds—and Sydney, the martyr of freedom and republicanism, concur on this head.—Coke says "it is the custom of parliament, when any new device is moved for on the king's behalf, for his aid, and the like, that the commons may answer, they dare not agree to it without conference with their counties." And Sydney (while he admits that the constituents cannot call the representatives to account, otherwise than by not re-electing them, if they disapprove their conduct) maintains—"that members derive their power from those that choose them—that those who give power, do not give an unreserved power—that many members, in all ages, and sometimes the whole body of the commons have refused to vote, till they consulted with those who sent them—that the houses have often adjourned to give them time to do so—and if this were done more frequently, or if cities, towns and counties had on

some occasions given instructions to their deputies, matters would probably have gone better in Parliament than they have done." In strict union with these opinions of Sydney, are the inferences deducible from all the principles of government, maintained and established, concerning the nature of political trusts, by the apostle of truth and liberty, the immortal Locke. Blackstone indeed dissents—he denies the right of the constituents to instruct the representative: but while the praise of classic and of legal learning is universally accorded him, the whigs of England (who concur with us, that government is a trust for the benefit of the governed) have uniformly denied the orthodoxy of his politics. The celebrated Edmund Burke, a man, it must be admitted, of profound knowledge, deep foresight and transcendent abilities, disobeyed the instructions of his constituents; yet, by placing his excuse on the ground that the instructions were but the clamour of the day, he seems to admit the authority of instructions soberly and deliberately given; for he agrees "he ought to look to their opinions," (which he explains to mean their permanent settled opinions) "but not to the flash of the day;" and he says elsewhere, that he could not bear to show himself a representative, whose face did not reflect the face of his constituents—a face that did not joy in their joys and sorrow in their sorrows." It is remarkable, that notwithstanding a most splendid display of warm and touching eloquence, the people of Bristol would not re-elect Mr Burke, for this very offence of disobeying instructions.

It appears, therefore, that the right of the constituent to instruct the representative, is firmly established in England, on the broad basis of the nature of representation. The existence of that right, there, has been demonstrated by the only practicable evidence, by which the principles of an unwritten constitution can be ascertained—history and precedent.

If in England, from the days of the youth and innocence of Parliament, while yet the free spirit of her Saxon laws remained in original simplicity and purity—from the earliest to the latest periods of her eventful history—throughout all the convulsions and vicissitudes she has undergone—the right to instruct their representatives, has been unceasingly claimed by the people, often exercised, sometimes formally acknowledged, and frequently im-

licitly obeyed, by the House of Commons; if their greatest constitutional lawyers, their purest patriots, their ablest statesmen, and those profound authors, who first revealed to the modern world the true nature of government, have, under various circumstances and at disjointed periods of time, concurred in sanctioning, to the people of England, this great right of instruction; who should presume to deny, to the freemen of America, the same degree of control over their representatives? If in England, over whose government, even in its theory and utmost purity, the people have no direct control, except in one branch of the legislature—whose system of representation, compared with that of the United States, is at best but a numerous open aristocracy—where the representative is eligible from the great body of the nation, from the wide extent of the empire, without any qualification of local residence—the right of instruction has been uniformly asserted and admitted and enjoyed; much more unquestionable is it in the United States, where the people are acknowledged to be the only legitimate source of all legislation—where the representative and constituent bodies are more intimately connected by the constitution—where none can be a representative or Senator who shall not, when elected, be an inhabitant of the state for which he is chosen.

It is deeply to be lamented, that in this country, the collection of the opinions of our own wise, good and great men, should be, as it is, so scanty and so rare. The doctrines of statesmen, most deeply skilled in political science, and especially in the principles of representative government, have sunk into oblivion, as themselves have sunk into the grave. The voice of our fathers is heard by their children, only in the murmurs of indistinct tradition—that voice, which might minister light to our minds, harmony to our opinions, stability to our principles, and veneration to our institutions. The authority of American statesmen in support of the general right of instruction, though it were certainly the best, is the least of all capable of distinct citation. Happily, that is not now necessary: how generally the right of instruction (as between the people and the state governments particularly) has been acknowledged, how little questioned, how often exercised, and how dearly valued, in Virginia, at least, the memory of every man must abound with proofs.

The general assembly therefore rest satisfied, that in exercising the right of instructing the senators in Congress, it has advanced no novel pretension, as it will presently appear it has made no unjust one: and that, if example could justify disobedience to such a command, even that justification is wanting on the present occasion.

To view the subject upon principle.—The right of the constituent to instruct the representative body, seems to result clearly and conclusively, from the very nature of the representative system. Through means of that noble institution, the largest nation may, almost as conveniently as the smallest, enjoy all the advantages of a government by the people, without any of the evils of democracy—precipitation, confusion, turbulence, distraction from the ordinary and useful pursuits of industry. And it is only to avoid those and the like mischiefs, that representation is substituted for the direct suffrage of the people in the office of legislation. The representative, therefore, must, in the nature of things, represent his own particular constituents only. He must, indeed, look to the general good of the nation; but he must look also, and especially to the interests of his particular constituents, as concerned in the common weal; because the general good is but the aggregate of individual happiness. He must legislate for the whole nation: but laws are expressions of the general will: and the general will is only the result of individual wills fairly collected and compared: in order to which collection and comparison, that is, in order to express the general will, in order to make laws, it is plain, that the representative must express the will, and speak the opinions, of the constituents that depute him.

It cannot be pretended, that a representative is to be the organ of his own will alone; for then, he would be so far despotick. *He must be the organ of others*—of whom? Not of the nation, for the nation deposes him not; but of his constituents, who alone know, alone have trusted, and can alone displace him. And if it be his province and his duty, in general, to express the will of his constituents, to the best of his knowledge, without being particularly informed thereof; it seems impossible to contend, that he is not bound to do so, when he is so specially informed and instructed.

The right of the constituent to instruct the representative, therefore, is an essential principle of the representative system. It may be remarked, that wherever representation has been introduced, however unfavourable the circumstances under which it existed, however short its duration, however unimportant its functions, however dimly understood—the right of instruction has always been regarded as inseparably incidental to it. Not to mention other instances, which history affords, we are informed that “*procuradores*, or members for Castile in the corte held at Madrid, in the beginning of the reign of Charles V., excused themselves from granting the supplies he desired, *because they had received no orders from their constituents*; and afterwards, receiving express orders not to do it, they gave Charles a flat denial. The same was the custom in France, before that country was enslaved. The general assemblies being laid aside, the same custom is still (latter end of 17th century) used in the lesser assemblies of the states in Languedoc and Bretagne.”

It is a maxim of all governments founded on contract, that no man can be bound by laws to which he has not given his assent, either directly or mediately by his representative, or virtually through representatives chosen by his fellow-citizens, among whom he dwells, having the same general and local interest with himself. If the right of the constituent to instruct the representative be denied, a law might be enacted, according to all the forms of the constitution, and yet contrary to the express will of every man in the community, the individual representatives themselves only excepted. If one representative may disobey the instructions of his constituents, the whole representative, may disobey the whole constituent body. If then, a law were proposed, against which the nation solemnly and unanimously protested, and which the people with one voice instructed their representatives to oppose; if the representative might lawfully disobey, and should *in fact* disobey, such instruction; here would be a law, binding on the people, enacted not only without, but directly against their consent.

A representative has indeed a wide field of discretion left to him; and great is the confidence reposed in his integrity, fidelity, wisdom, zeal; but neither is the field of discretion boundless, nor the extent of confidence infinite: and the very discretion

allowed him, and the very confidence he enjoys, is grounded on the supposition, that he is charged with the will, acquainted with the opinions, and devoted to the interests of his constituents.

But although the position be admitted, which indeed it seems impossible to deny, that the people have a right to instruct their immediate representatives, or that the people composing each state in their sovereign capacity, may instruct their senators in Congress; it may still be denied, that the state-legislatures have any such right of instruction.

It is obvious to remark, in the first place, that those who allow to *the people of each state*, the exercise of this act of sovereignty, the instructions of their senators, and deny the same power to the *state-legislatures*; give us the empty theory, and deny us the beneficial practice of such instructions. It is difficult to conceive how the *people* can give such instructions, otherwise than through their *state-legislatures*.

The several state-constitutions—saving to the people the sole right to alter, amend or abolish the forms of government—saving certain other great natural rights, which the legislatures are forbidden to touch—and excepting certain powers, specified in the constitution of the United States, which are transferred by the people and by the states, from the state-governments to the general government—do certainly vest in the state-legislatures, every power and attribute of sovereignty, which the people themselves would otherwise exercise in person. Those legislatures are in fact, in the daily exercise of all powers belonging to the state-sovereignty, except those thus forbidden to them. Now, the power to instruct the senators of the states in Congress, has not been forbidden by the state-constitutions to the state-legislatures, and retained by the people in their own hands. Therefore, the state-legislatures may exercise this act of sovereignty, this right of instructing their senators, as properly as they may exercise any of those powers, which they exercise daily, without any doubt about their right, and which yet are not granted to them by any express delegation.

Of this doctrine, the whole history of all the American governments proves the justness. The *state-legislatures* sent deputies to the first Congress; *they* formed the old articles of confederation of the United States; *they* sent deputies to the federal con-

vention that framed the present constitution ; and *they* called the conventions of the people which ratified that constitution. Had they any express grant of power to perform these important acts? Yet, was it ever doubted, that they had a rightful power? All these great acts of sovereignty are as much beyond the range of ordinary state-legislation, as is this power of instructing senators.

But this right of the state-legislatures to instruct their senators in Congress, is yet more conclusively demonstrable from a view of the federal constitution, taken with its context, the old articles of confederation.

The articles of confederation were certainly nothing more than a perpetual solemn league and covenant between the state-sovereignties. The federal convention was deputed to amend them. It, however, proposed a new system, which, in its construction of the House of Representatives, departs from the principles of the league, and is clearly national ; but in that of the Senate adheres to those principles, and is clearly federative—federative, as well in the equality of representation as in the mode of election. This was no more, in effect, than engrafting so much of the former league upon the new constitution ; making that branch of the government as the whole had formerly been, the representative of the state-sovereignties ; and placing it, like the Congress, under the articles of confederation, under the influence of the state-legislatures. Now, the right of the state-legislatures to instruct their delegates in Congress under the confederation, never was doubted. The Senators under the present constitution stand in the same relation to the state-government. The Senate was designed, in truth, to form the balance of the new constitution ; to check the consolidating tendencies of the other principles of the system, and to preserve the state-governments inviolate. Such was certainly the contemporaneous exposition of the subject.

It has been asked by some—if the state-legislatures may instruct their senators, why may not the colleges of presidential electors instruct the President? The right of the state-legislatures to instruct the senators, rests not solely on the ground that they elect them ; but if it did, there is no similitude between the electoral and legislative bodies, in regard to the right of instruc-

tion. Instead of a parallel, there runs a contrast, between them. The former exists but a few weeks, is created for a single purpose, and when that is answered, is dissolved forever: the latter may be regarded as always in existence, is created for general purposes, and is the fair representative of the state-sovereignities. No one electoral body elects the President and Vice-President; each gives only the votes of one state; no one of them, therefore, can, with any colour of right, claim control over officers elected by the electors of all the states: whereas the state-legislatures have the exclusive election of their senators, who return to them for re-election. Every facility for action too, is possessed by the one; to the other it would be impracticable to act at all. Besides, the President and senators are officers of very different character: *he* is truly the representative of the whole nation, elected by all, responsible to all; *they* are the representatives of the states, elected by the states, responsible to the states; and we naturally look to our particular representatives, to promote the objects we have at heart. *To instruct the President* were absolutely impossible.

It has been argued, that if the state-legislature may instruct their senators in Congress, so may also the state-executives. But the state-executives are clearly, in no case, the electors of the senators; they are vested with the appointment during the recess of the legislatures, from mere necessity. And it is not the executive, but the legislative bodies of the states, that are clothed with the state sovereignties: this is the great distinction.

The power of the state-legislatures to interpose on questions of deep political interest, in the affairs of the general government, by way of instruction to their senators, and the obligation of such instructions, are sustained by authorities, the weight of which will not be resisted.

The celebrated authors of the Letters of *Publius*, speak the following unequivocal language: "If the majority, in the general government, should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the state-legislatures, who will always be not only vigilant, but suspicious and jealous guardians

of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people and not only to be the voice, but if necessary, the arm of their discontent." And again—"It may safely be received as an axiom in our political system, that the state-governments will, in all possible contingencies, afford complete security against invasion of the publick liberty by the national authority. Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states; and unite their common forces for the protection of their common liberty." Even the federalist, then, agrees that the state-legislatures may interpose to prevent danger, or to resist usurpation; proportioning their opposition to the magnitude of the evil. But how interpose? By sowing the seeds of faction in silence? Or by arms? Or by publick and dignified instructions? Let not those, who deprecate intestine feuds and civil wars, deny the right or obligation of instructions.

The session of the general assembly of Virginia, of 1799—1800, is memorable for "the report of a committee, to whom was referred the communications of various states relative to the resolutions of the (then) last general assembly of this state, concerning the alien and sedition laws." In this celebrated state-paper, authoritative for the reasoning it contains, it became necessary to defend the state-right of interposition in the affairs of the general government: and it is stated "to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The constitution of the United States was formed by the sanction of the

states, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the constitution, that it rests on this legitimate and solid foundation. The states then, being parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal above their authority [it is the sovereign authority of the states exercised by the legislatures that is here spoken of] to decide in the last resort, whether the compact made by them be violated; and consequently, that as parties to it, they must themselves decide in the last resort, such questions as may be of sufficient magnitude to require their interposition."

If the passages above cited be orthodox, the main proposition which hath been above urged, to prove the right of a state legislature to instruct its senators, is established—that *the state-legislature is clothed with the general attributes of the state-sovereignty.*

Those doctrines, too, afford a plain inference, that instructions from the constituent legislatures to their senators in Congress, are publick acts within the sphere of that portion of the state-sovereignty, not retained by the people; nor delegated by the constitution of the United States to the general government, but represented and possessed by the state-legislatures.

And if those doctrines be correct, there will be an end also to that distinction, which has been insisted on, between instructions on constitutional points, which have been said not to be obligatory on a senator, and instructions on matters of policy, which are allowed to be obligatory. On the contrary, it would appear, that if there be any difference in the obligation of such instructions, those of the former description are of the stronger obligation; since the infraction of the bond of union, gives the states the strongest claim to interfere; though measures of evil policy might be attempted, which would equally jeopardize the independence of all, and consequently the happiness of each, as any violation of the constitution.

The general assembly will not offer additional argument to fortify the conclusive reasoning of "The Federalist," or of the assembly in 1799—1800, above referred to.

At the session of the general assembly of 1799—1800, also, various instructions were given to our then senators in Congress.

It is believed that neither the right, nor the obligation of those instructions was then questioned. It cannot escape observation, that those instructions, as well as the report above mentioned, are sanctioned with the recorded assent of the same honourable senator, who has since denied the obligation of the senator to obey, while he admitted the right of the state-legislature to instruct; which is precisely the relation, not between the state-legislature and a senator, but between it and a member of the House of Representatives: a senator is instructed; a representative requested. The honourable senator formerly voted to instruct our senators and to request our representatives. To instruct—is not merely to recommend: an instruction to a senator, in contradistinction to a request to a representative, implies a command. It is useless to offer proof, that the right to command implies the duty to obey. And it is hoped, that the language of the honourable senator was either not maturely considered or not correctly reported.

It hath been stated to the world, that the legislature of Virginia instructed their senators in 1808, to use their best endeavours to obtain amendments to the constitution of the United States, which, would, in effect, give the state-legislatures the right of recalling their respective senators in Congress; and that this instruction was *substantially* disobeyed. The fact may have been as stated. It is only mentioned here, that it may be remarked, that it passed without censure, only because it passed without notice. It never was understood as an act of resistance to instructions.

Various objections have been urged to this claim of the constituent, of a right to instruct the representative, on which it may be proper to bestow some attention.

The first objection that comes to be considered, lies chiefly against the right of the people to instruct their immediate representatives; and is grounded on the supposed impossibility of fairly ascertaining the sense of the constituent body. The impossibility is denied; it may often be matter of great difficulty. But then the duty of obedience resolves itself into a question, not of principle, but of fact—whether the right of instruction has been exercised or not. The representative cannot be bound by an instruction that is not given; but that is no objection to

the obligation of an instruction actually given. And, at least, this objection cannot apply to instructions voted by a state-legislature.

It has been urged, that representatives are not bound to obey the instructions of their constituents, because the constituents do not hear the debates, and therefore cannot be supposed judges of the matter to be voted. If this objection have force enough to defeat the right of instruction, it ought to take away, also, the right of rejecting the representative at a subsequent election. For it might be equally urged on that occasion, as against the right of instruction, that the people heard not the debate that enlightened the representative's mind—the reasons, that convinced his judgment, and governed his conduct. If the right of instruction be abandoned on this ground, the right of rejection should be yielded also. In other words, the principle, that mankind is competent to self-government, should be renounced. The truth is, that our institutions suppose, that although the representative ought to be, and generally will be, selected for superior virtue and intelligence, yet a greater mass of wisdom and virtue still reside in the constituent body, than the utmost portion allotted to any individual.

But it has been said, that a state government may instruct its senators to violate the constitution of the United States—that a state, in actual insurrection against the general government, may instruct its senators, to promote the cause of rebellion: and it is asked, whether the senator would be bound by such instruction, to violate the constitution he had sworn to preserve, and to overthrow the government he had sworn to defend?

It may be answered, in the first place, that the particular instruction, which forms the subject of present consideration, could by no possibility involve a breach of the constitution of the United States. It might, and in the opinion of this assembly, would have been unconstitutional to charter the bank of the United States anew; but surely, it could not possibly be deemed unconstitutional, not to charter it.

As to the rest, without determining the point, which has been taken for granted, that a state in open rebellion against the general government, would still be entitled to its representation in the Senate of the United States, which, to say the least, is ex-

tremely doubtful—it is admitted without difficulty, that if a state instruct its senator to give a vote plainly unconstitutional, or to raise the standard of rebellion, the senator is *not* bound to obey such instruction. Every case, such as that supposed, must stand on its own peculiar circumstances: it supposes all bounds of right transcended, all legitimate rule prostrated: and the propriety of opposition must be determined by the nature of the injustice, the extent of the mischief, and the prudence of resistance. But it is no argument against the exercise of a lawful power, that it may be made the pretext for the assumption of an unlawful power. The right of instruction, rightfully exercised, with no evil intention, to no pernicious object, cannot be affected by the admission, that if either a state-government, or the general government, become corrupt and ambitious, and usurp tyrannical power, it may of right, and ought to be resisted. The admission is cheerfully made. The general assembly of Virginia is incapable of affirming the exploded doctrine of non-resistance.

Finally, it has been objected, that the instructions of the constituent are not obligatory on the representative, because the obligation insisted on is fortified with no sanction; the representative cannot be punished for his disobedience, and his vote is valid notwithstanding his disobedience. It is true, that there is no mode of legal punishment provided for this offence, this default of duty; and that the act of disobedience will not invalidate the vote. It is true, too, that a representative may perversely advocate a measure which he knows to be ruinous to his country; and that neither his vote will be invalidated by his depravity, nor can he be punished by law for his crime, heinous as it surely is. But it does not follow, that the one representative is *not bound to obey the instructions of his constituents*, any more than that the other is not bound to obey the dictates of his conscience. Both duties stand upon the same foundation, with almost all the great political and moral obligations. The noblest duties of man are without any legal sanction: the great mass of social duties—duties the most important, most sacred, most useful—our duties to our parents, to our children, to our wives, to our families, to our neighbour, to our country, our duties to God, are, for the most part, without legal sanction, yet surely not without the strongest obligation. The duty of the *representa-*

five to obey the instructions of the *constituent* body, cannot be placed on higher ground.

Such are the opinions of the general assembly of Virginia, on the subject of this great right of instruction, and such the *general* reasons on which those opinions are founded. The subject is susceptible of various other, and very strong views, which are not pretermitted, because they are not understood, but because they are deemed unnecessary.

1. *Resolved*, therefore, that this assembly doth highly and equally disapprove the conduct of both the senators of this state in Congress, in relation to the subject of the bank of the United States, and to the instructions concerning the same, given to the said senators, by the general assembly at the last session.

2. *Resolved*, That it is the indubitable right of the state-legislatures, to instruct their senators in Congress, on all points, either constitutional or politick, whenever the magnitude of the occasion shall require such interference; and that, by consequence, it is the bounden duty of the senators to obey such instructions; provided the instructions to be given and obeyed, require not the senator to commit a violation of the constitution, or an act of moral turpitude.

3. *Resolved*, That after this solemn expression of the opinion the general assembly, on the right of instruction, and the duty of obedience thereto, no man ought thenceforth to accept the appointment of a senator of the United States from Virginia, who doth not hold himself bound to obey such instructions.

REVIEW.

Code d'Instruction Criminelle; Edition conforme à l'édition originale du Bulletin des Lois; suivi des Motifs exposés par les Conseillers d'Etat, et des Rapports faits par la Commission de Legislation du Corps Legislatif, sur chacun des Lois qui composent le Code.— A Paris, 1899.

It sounds a little like the beginning of a tritical Essay to say, that there is nothing which it is of so much consequence for a people to know, as the excellences and defects of *their laws*. But it is not quite tritical, we believe, to say, that it is of infinitely more consequence that they should know the *defects* than the excellences of their laws; and that there is nothing with which they are so unwilling to be made acquainted. The little sentiment of personal consequence, attaches itself to all the institutions under which we have been accustomed to live *Our family, our country, our laws, our government*,—must be better than all other families, countries, laws and governments!—and in this temper, which is habitual to the greatest part of mankind, and to the least enlightened the most remarkably, we would rather bear all the evils resulting from the defects of our laws, than allow that there can be any defects in the laws of so wonderful a people. Gnothi seauton (Know thyself,) which the highest authority has converted into a rule of Christian perfection, useful and difficult as it may be to individuals, is perhaps still more highly useful to communities, and still more difficult to practise. Of their overweening partialities to themselves personally, men, if they are not the weakest of men, are generally ashamed; but national partialities, how weak and ridiculous soever, are boasted of as patriotism; and he who would reason against them, runs some risk of being treated as an enemy to his country. Yet there is no way in which false notions of himself are likely to be prejudicial to an individual, in which a similar error is not likely to produce still worse consequences to a nation.

Horace represents it as a master-piece of art, in his father, when warning him against the vices into which he thought him

most likely to fall, that, instead of wounding his self-love, by pointing to the defects of his own character, he called his attention to the defects, along with their evil consequences, which were prominent in the characters of neighbours.

"Cum me hortaretur, parce, frugaliter, atque
Viverem ut contentus eo, quod intipai parasset—
Nonne vides Albi ut male vivat filius? Utque
Barrus inops?—"

———A turpi meretricis amore

Cum deterreret,—"Sotani dissimilis es." &c.

Well acquainted with the temper of our countrymen, it has been a study with us to imitate the conduct of the judicious Roman. Knowing that those with whom we have to deal, would not bear to have the defects of their own institutions presented to them naked, we have, as often as possible, afforded them occasions to contemplate the defects of institutions not their own; in hopes that, by learning and understanding what is hurtful and beneficial to others, they may make some progress, however slowly and indirectly, in discerning what is hurtful and beneficial to themselves.

In the field of law, the objects of contemplation with which Bonaparte has presented us, are next in interest to those which he has exhibited in the field of war. The manner in which our interests are liable to be affected by the country of whose powers he disposes, renders that country, and all which concerns it, especially what so deeply concerns it as the laws which regulate the lives and properties of the people, a subject of deep interest and curiosity. He has now nearly, if not entirely, completed for his subjects a new body of law. The Civil Code, that is, the body of laws destined to include all cases not penal, has been in execution for several years. Some time ago, a Code of Procedure, that is, a body of rules ascertaining and establishing the steps to be pursued by the officers of justice, in all the cases embraced by the Civil Code, was likewise promulgated. The Penal Code, that is, the branch of law which defines the actions that call for punishment, and fixes the punishment for each forbidden act, has been delayed. Whether it is yet published or not, the state of the intercourse between this country and France hardly enables

us to ascertain. The Code of Procedure, however, adapted to penal cases, has recently reached this island; and though it would have been somewhat more satisfactory to have spoken of it, after perusing the Penal Code itself, yet, the reasons are strong which induce us, without any longer delay, to present a short account of it to our readers. Of the four compartments into which it has pleased Bonaparte's legal advisers to divide the body of law, viz. 1. The Civil Code, and 2. Code of Procedure in civil cases; 3. The Penal Code, and 4. Code of Procedure in penal cases; the last may be thought to embrace the simplest part of the subject; though it contains some features—for example, jury-trial, re-established on a new foundation,—which are peculiarly calculated to engage the attention of *English readers*. As crimes are nearly the same all over the world, the Penal Codes of all nations are, except in the varieties of punishment, to a remarkable degree, the same. But, in the forms and the spirit of their Procedure—in the mode of dealing with the question of delinquency, and the supposed delinquent, from the first suspicion till the final decision, the diversity in the practice of nations is not only universal, but, in almost every instance, exceedingly great. The picture which the law of procedure presents, is, therefore, in a peculiar degree, new and striking.

The course of judicial procedure consists of several stages. In penal cases, with which alone we have at present to do, these stages are three. 1. The procedure employed to *secure* the suspected individual, and the evidence which may be supposed to exist of his guilt: 2. The procedure employed for exhibiting and determining on the evidence which has been so collected, and for pronouncing the proper sentence: 3. The procedure employed for inflicting the punishment thus ascertained to be due—in other words,—the trial; what goes before the trial; and what follows after the trial. Such, on all ordinary occasions, are the parts of judicial procedure; and such are the points in the new legislation of France, to which we are now to direct the attention of our readers.

To those who are not in some degree acquainted with the language of French law, it is necessary to explain, that the system of operations by which the courts of law carry the directions of the legislator into effect, is, in civil cases, denominated *Proce-*

ture—Procedare civile. In penal cases, it is denominated *Instruction—Instruction criminelle.* To institute a prosecution is, *instruire un proces.* And the Code before us, containing the rules of procedure in penal cases, is hence denominated *Code d'Instruction Criminelle.* We begin with that part of the procedure which is first in order; namely, that which precedes the business of the trial, and is necessary to render it effectual to its end.

The objects to which this preliminary business is directed, are three. One is, that nothing which looks like an offence, shall pass without judicial investigation; another is, that every individual on whom the suspicion of an offence attaches, shall be duly secured; and the third is, that whatever is capable of yielding evidence on the case, shall, as far as possible, be searched out and secured for that purpose.

Now, then, let us see what are the provisions made by the French legislators for the attainment of these several ends. They have provided a vast apparatus; and the parts of the machinery are sometimes so intertwined and complicated together, that any thing like a distinct idea of it is not very easy to be acquired. We have taken pains to present it in the simplest point of view.

This first of the stages of judicial procedure in penal cases, they call *police judiciaire.* What is usually known elsewhere by the name of *police*, they call *police administrative*, and distinguish it thus. Those offences which are only apprehended, are the objects of *administrative police*, and its business is to do all that is possible towards *preventing* such offences from being committed; or where prevention is not possible, to take such previous measures as may prevent the criminal from making his escape, or the evidence of his guilt from being lost. It is, therefore, offences *about to be committed* which are the objects of administrative police. It is offences *already committed* which are the objects of *police judiciaire.*

The French legislators have distinguished offences into three kinds, and have adopted a mode of procedure, in some respects different, according as the offence in question is considered as belonging to one or another of these divisions. Offences penal in the lowest degree, are called *contraventions*, and are punishable with a fine not exceeding fifteen francs, or imprisonment

not exceeding five days. Offences penal in the second degree, are called *delits*; and are punishable with imprisonment exceeding five days, or fine above fifteen francs. Offences penal in the highest degree, are named *crimes*; and are subject to what is called *peine afflictive ou infamante*.

Each of these classes of offences has a separate order of tribunals, before which, all acts of that particular class are tried. For the trial of offences of the first order, the tribunal is called *Tribunal de Police*; for the second, *Tribunal en Matiere Correctionnelle*; for the third, *Cour d'Assises*. The composition of the two first, it will be useful to state here: the nature of the last it will be better to explain afterwards.

Functionaries, styled *Juges de Paix*, are the judges in the *Tribunaux de Police*, which are placed at small distances from each other over the whole surface of the empire; and the *Maires* of the municipalities have concurrent jurisdiction in most cases with these persons.

The first order of the tribunals, in civil cases, (*Tribunaux Civiles de premiere instance*;) are rendered also the *Tribunaux en Matiere Correctionnelle*; and try all offences of the second order.

In the *Tribunaux de Police*, the inferior officers receive all informations and complaints relative to the first class of offences, of which they are bound to draw up an account in writing (*proces verbal*;) and to send it, with all the documents relative to the affair, to the publick officer or prosecutor, at the *Tribunal de Police*, within three days at the latest. In the *Tribunaux en Matiere Correctionnelle*, the preliminary steps being in substance the same with the mode pursued in regard to the last and principal class of offences, we shall pass it over; and proceed immediately to point out the steps by which, in these highest cases, the supposed offender, with the evidence of his guilt, is secured for the operations of the judge.

There are two officers to whom the principal share in this preliminary business is entrusted: these are, the *Procureur Imperial*, and the *Juge d'Instruction*. The *Procureur Imperial* is the publick prosecutor at each tribunal; the *Juge d'Instruction* is the particular judge by whom the preliminary investigation is appointed to be taken; of which class of judges, one is ee

established in each *Arrondissement Communal*; two, where two are necessary; and at Paris six. They are nominated by the Emperour from among the judges of the *Tribunal Civil*; and continue in office for three years.

The proper duty of the *Procureur* is, to prosecute all manner of crimes committed within his district, and to take care that they receive judicial investigation. His business is, upon obtaining knowledge of any offence, to give notice of it to the *Juge d'Instruction*, and require him to examine into the affair—to repair himself to the spot—and to do whatever is necessary for throwing light upon the offence, and for preventing the escape of the offender. The *Procureur Imperial* is held, in such a manner, responsible for the prosecution of crimes, that the orator by whom the *projet de loi* was presented to the legislative body, expressly says, “he may lay it down as a rule, that the *Procureur Imperial* must deserve reproach, wheresoever there is reason to complain of frequent infractions of the social order in the place where his functions are exercised.”

In order to facilitate, as much as possible, the communication of intelligence respecting crimes, the *Juges de Paix*, the *Officiers de Gendarmerie*, the *Commissaires de Police*, the *Maires*, and the *Adjointe de Maires*, are all appointed to receive the informations and complaints of individuals, and to transmit them, without delay, to the *Procureur Imperial*.

The business of the *Juge d'Instruction* is to take the most accurate account, possible, of the circumstances of the offence of which notice has reached him: and this he performs by bringing before him all persons, as well as things, whom, from the proceedings of the *Procureur*, or the statements of the informer, he may suppose likely to throw light upon the affair. The *inculpe*, the alleged offender, if his offence is not of the third or highest order, is only cited to appear; if it is of the third order, he is commanded to be brought before the *Juge d'Instruction*.

The witnesses are to be examined upon oath, by the *Juge d'Instruction*, but separately, and not in presence of the presumed offender; their depositions taken down in writing, and with the usual precautions against alteration or forgery. Persons under fifteen years of age, to be examined, but not upon oath. The inanimate subjects of evidence are to be inspected by the *Juge*

d'Instruction ; and he is to go to the place where they are, if they are of such a nature as cannot, without great inconvenience, be brought to him.

The process of investigation having been gone through, and the *inculpe* himself, and the persons most nearly related to him, examined, the *Juge d'Instruction*, after hearing the prosecutor, and the prosecuted, may, if the alleged offence is of the most penal class, and the presumption afforded by the evidence is strong, order the now probable offender to be held in custody. This order is denominated *mandat d'arret*, or *mandat de depot*. And, besides the ordinary precautions against the mischief, which is liable to be done under colour of legal imprisonment, the order must contain a statement of the fact on account of which the party is prosecuted, and a reference to the law by which the fact is rendered penal.

These orders are in force through the whole territory of France. When the offender is found without the limits of the jurisdiction of the judge by whom the *mandat* was issued, the officer charged with the execution must first carry the person before the *Juge de Paix* of the place, though only for the purpose of proving the authenticity of the *mandat* with which he is charged.

The person against whom the *mandat* is issued, is conveyed to the house of custody (*maison d'arret*,) either of the place where the judge who has issued it exercises his functions ; or, if he has not so ordered, to the *maison d'arret* of the place where the *inculpe* was found.

In those cases, however, which are called cases of *flagrant delit*, additional officers, for the sake of rapid interference, are vested with authority to make preliminary investigations. Cases of *flagrant delit*, are defined to be, when the offence is still in the act of being committed ; or where it is very recently committed ; or where the offender is pursued by *clameur publique* (hue and cry) ; or where he is caught with the instruments, or objects, or effects, &c. of his crime about him.—In such cases, the *Procureur Imperial* has also the power of preliminary investigation ; and may, without waiting for the *Juge d'Instruction*, draw up an account, in writing, of the circumstances of the case, and take down the declarations of all persons who may

know any thing relative to the affair, not excepting the nearest relations of the parties. The persons examined are requested to sign their declarations ; and, if they refuse to do so, their refusal is mentioned in his report. He interrogates the presumed offender, who signs his own declaration, if he chooses ; if not, mention of his refusal is inserted in the report. When it is presumed that indications of his guilt may be found in the house of the alleged offender, the *Procureur* must repair thither, make search for, and secure, for the purpose of evidence, whatever he deems capable of serving in that capacity. The articles, where it is practicable, are to be sealed up ; where it is not, they are to be put into a box, or a bag, on which the *Procureur* is to fasten a band of paper, and attach his seal. All this is to be done in the presence of the supposed offender, or of some one empowered by him ; and the objects are to be presented to him to own, and affix his name to them, if he chooses ; if not, mention must, in the report, be made of his refusal. When the presumption afforded by the evidence is strong, the *Procureur* is to order the *inculpe*, if present, to be detained ; if absent, to be taken into custody.

Where the *Juge d'Instruction* comes, his presence supersedes all other functions of the *Procureur*, saving those which belong to him as prosecutor merely. But when the investigation has been, as above, completed by himself, he is to transmit his report without delay, and all the documents connected with it, to this judge.

The *Juge d'Instruction* himself is, in cases of *flagrant delit*, to proceed, if necessary, without the presence of the *Procureur Imperial*, to whom, however, he must send notice ; and as the knowledge of meditated crimes peculiarly qualifies the officers of administrative police to be serviceable, in cases of sudden emergency, the *Prefets des Departements*, and the *Prefet de Police*, at Paris, are vested with the power of performing in person, or of requiring the officers of *police judiciaire*, to perform the preliminary investigations, and all the acts therewith connected.

The first stage of the proceedings is now completed ; the case is explored ; all that can throw light upon it has been collected ; and the presumed offender is secured for trial. But, who

is to determine whether there is occasion for a trial or not? Is it the judge who has collected the evidence?—No. For this purpose, there is, first, the *Chambre du Conseil*, which must contain three judges at the least, including the *Juge d'Instruction*. To them the *Juge d'Instruction* is bound to deliver a report, once a week at the least, of every case which has called upon him for investigation. If the judges of the *Chambre du Conseil* are *unanimous* in opinion that no crime has been committed, or that none but frivolous evidence is brought against the accused, they may decide, that there is no need for a trial, and order him to be set at liberty; subject, at the same time, to the remonstrance of the *Procureur Imperial*. If they find the offence to belong to the first or second order, they may send the offender to the *Tribunal de Police*, or to the *Tribunal en Matiere Correctionnelle*, according as the case may be. If, however, so much as one of them deems the case meet for trial, as a case in the third order of offences, they are to transmit the reports, and all other documents belonging to the case, through the *Procureur Imperial* to the *Cour Imperial*.

The functions of the *Cour Imperial* are as follows. *Procureur general* is the name of the publick prosecutor in this court. It is to him immediately that the documents are transmitted from the *Chambre du Conseil*. He is bound to place the affair *en etat* (as they express it,) within five days after receiving the documents; and in five days more to make his report.

A section of the court called the *Cour Imperial*, especially formed for that duty, must assemble, once a week at the least, in the *Chambre du Conseil*, to hear the report of the *Procureur general*, and must decide, within three days, whether the fact charged is a crime by law, and whether the proofs against the prisoner are sufficiently strong to make it proper to send him to trial.

They deliberate *in secret*. When it appears to them necessary, they even order further inquiries, and call for the production of additional documents.

If they find either that no crime has been committed, or that no sufficient evidence is brought against the accused, they order him to be set at liberty. If they find that an offence of the first or second order only has been committed, they send him to the

tribunals appointed to take cognizance of these offences. If the offence appear to be one of the third order, and the evidence such as to afford reasonable suspicions of his guilt, they pronounce the sentence which is called *mise en accusation*, (equivalent to the English finding of a true bill,) and detain the prisoner for trial.

In all cases, the *Cours Imperiales* may, antecedently to their pronouncing the sentence of *mise en accusation*, appoint one of their judges to go again through the whole process of the preliminary investigation, for their satisfaction.

In all cases where the *mise en accusation* is pronounced, the *Procureur general* must draw up an *acte d'accusation*, which must set forth, 1. the proper generick description of the offence which has been committed; 2. the special fact, and all the circumstances which tend to aggravate or extenuate its atrocity. It must name, and clearly designate, the accused; and it must be summed up with the following conclusion: "In consequence, A [the prisoner] is accused of having committed such or such a murder, such or such robbery, or other crime, with such or such circumstances." A copy of the sentence [of *mise en accusation*] with a copy of the *acte d'accusation*, must be given to the prisoner; and, within twenty-four hours, he must be removed from the *Maison d'arret* to the *Maison de justice*, attached to the court at which he is to be tried.

Such, then, is the mode of procedure in the two great sets of cases. In the lowest order of offences, the offender is left at large, till called upon to undergo the punishment which the judge may ordain. In the highest, the person of the supposed offender, as soon as the presumption of his guilt is supported by reasonable proofs, is retained in custody, as the only adequate security for his submitting himself to justice. But, besides these two orders of offences, there is evidently an intermediate order—too serious to admit of that unrestrained liberty which is left to the offender in the case of the slightest offences, but not of that weight and danger which is supposed to justify the imposition of so great a burden as imprisonment in the higher. In the jurisprudence, accordingly, of all nations who can be said, from their state of civilization, to have a jurisprudence, cases of delinquency, more or less accurately defined, have been selected, in

which some sort of pledge, less onerous than imprisonment, has been taken as security for a man's submitting himself to justice. The following, in regard to this material point, are the regulations established by the authors of the present code.

With regard to all offences which we have denominated offences of the second order, pecuniary security, in a sum not less than 500 francs, is taken in the *Chambre du Conseil*. The offender himself may be his own security, or any one else may be security for him; upon proving that he is worth as much as the security demanded, and half as much more; or upon making deposit of a sum equal to the security. This sort of bail, however, is not to be taken in the case of vagabonds, or of those who have fled or concealed themselves from justice. If part of the punishment annexed to the offence consists in the obligation of rendering pecuniary satisfaction to the party injured, the security must be equal to thrice the amount of that satisfaction; the amount of which is, for this purpose, to be provisionally estimated by the *Juge d'Instruction*.

We have now seen the mode of procedure which is adopted in France, in the prosecution of crimes, from the first disclosure of the fact of the offence, till the supposed offender is delivered up to trial. We proceed now to the trial.

The court, before which it takes place, is called *Cour d'Assises*. One such court is established in every department. Its sessions are held every three months, or, if need be, oftener; and close only when there is no more business to be performed. The court is composed in the following manner:

In the department which is the seat of the *Cour Imperial*, five judges of that court sit as judges of assize. In the other departments, one of the judges of the *Cour Imperial* is delegated to officiate as judge and president; and to him are added four of the oldest judges of the *Tribunal de Premiere Instance* of the place. None of the judges by whom the preliminary proceedings were conducted, or by whom the sentence of *mise en accusation* was pronounced, are admitted to officiate as judges at the trial.

Of the *Cour d'Assises*, however, the jury is the most remarkable feature.—The lowest order of persons in France, were

not, it is said, found competent to the duties of jurymen. By the new law, therefore, jurymen can only be chosen from the seven following classes of persons ; 1. from among the members of the electoral colleges ; 2. from among the three hundred individuals domiciliated in the place, who pay the greatest amount of taxes ; 3. from among the functionaries of the administrative order, nominated by the emperor ; 4. from among the doctors and licentiates of one or more of the four faculties, the members and correspondents of the institute, and of other learned societies recognised by the government ; 5. from among the notaries ; 6. from among the bankers, agents of exchange, and merchants, taking out a license (*payant patente*) of one of the two highest classes ; 7. from among the agents of the administrative authorities, who enjoy appointments of not less than 4000 francs. Upon special application, however, or recommendation to the minister of justice, persons eminently qualified may be put upon the list of jurymen, though not belonging to any of those seven classes.

No one can be a jurymen, who has acted as an officer of *police judiciaire*,—as a witness, interpreter, or party, in the preliminary steps of the same affair. No minister of state—no prefect, or sub-prefect—no judge—no publick prosecutor, can be a jurymen—no clergyman, of any denomination, and no person, under thirty years of age. Certain publick functionaries—and persons not less than seventy years of age, may be exempted from the duty, if they desire it.

For each particular cause a jury is formed in the following manner. Fifteen days at least before the opening of the sessions of the *Cour d'Assises*, the president of the court must direct his requisition to the prefect, to form and transmit to him a list of jurymen. The list formed by the prefect consists of sixty. Within twenty-four hours from the time of receiving it, the president is bound to reduce it to thirty-six, by striking off the surplus ; and to send it back thus reduced to the prefect, who must then give notice to the individuals thus elected, eight days, at least, before the day on which they are called upon to be in readiness to serve. To the party accused, this list is to be communicated on the evening before the trial, but not sooner.

If, when the time of trial is come, less than thirty of the thirty-six jurymen left on the list are present, that number must be

made up by the president from the persons qualified to be jurymen, belonging to the *Arrondissement Communal*, where the court sits—these supplementary persons being chosen publicly, and by lot.

To select from the number thus formed, the twelve who are to serve as jurymen in the cause in question, the following course is pursued. The whole names are thrown into an urn: from which they are then taken out, and announced publicly one by one; and as each is taken out, the parties, both accuser and accused, are desired to challenge. The challenge is peremptory,—no reason asked, or allowed to be given. As soon as twelve names, not challenged, have been taken out, the jury is formed; and, as soon as the names remaining in the urn, added to the unchallenged names already drawn out, just suffice to compose the number twelve, an end is put to the power of challenging.

The accuser and the accused are allowed an equal number of challenges. Only, when the number of jurymen present is an odd number, the odd challenge is allowed to the prisoner.

Such is the composition of the *Cour d'Assises*. Its mode of procedure is as follows:

Within twenty-four hours after the prisoner, and the documents of his guilt, have been sent to the *Maison de Justice*, the president, or some other judge of the *Cour d'Assises*, must ask him, of whom he has made choice, as counsel, to aid him in his defence? If he has made choice of no one, the president shall, on pain of privation, immediately assign him one: which appointment by the president, however, may be superseded, by a posterior choice of the prisoner for himself. This assistant must be chosen among the *avocats*, or *avoués*, of the *Cour Imperial*. But the prisoner may ask, and receive permission to employ, in the capacity of his assistant, one of his relations or friends.

The judge is next directed to inform the accused, that if he thinks he has a plea of nullification (*demande en nullité*), he must make his declaration in five days. If he has not received this information, however, he may claim the exercise of the right at any time before the final sentence, but not after it.

The *demande en nullité*, or plea of nullification, will be readily understood by English lawyers; but may require a word of ex-

planation to others. It is an allegation, that the proceedings, or some part of them, have been irregular, and contrary to law, and consequently null. To pronounce upon the *demande en nullite*, is not the business of the *Cour d'Assises*, but of a special tribunal, called *Cour de Cassation*, to whom the plea must be immediately transmitted by the publick prosecutor attached to the *Cour d'Assises*. But, notwithstanding this *demande en nullite*, the proceedings at the *Cour d'Assises*, in the mean time, go on till the hearing exclusively. The trial may be put off, on the motion of either party, on cause shown; the absence, for example, of a material witness,—the sickness of the party, or of his counsel,—or the discovery of new witnesses, whose depositions must then be taken by the *Juge d'Instruction* of the place where they reside, and transmitted under his seal. The accused is entitled to one copy, gratis, of the whole *proces verbaux* (the reports) of the preliminary proceedings, and depositions of the witnesses; and may have other copies, on paying for them. The counsel for the accused may take, or cause to be taken, at the expense of their clients, copies of any such papers as they may deem useful to the defence.

The time for the trial being come, the first operation is, that of calling over the names of the jurymen, challenging them, and forming the jury, in the manner already described. The jury are placed so as directly to face the party on trial, who stands unfettered. He is asked by the president his age, profession, the place of his birth, and the place of his abode. The counsel are then duly admonished by the president, who proceeds to tender to the jury their oath, in the following words.—“ You swear and promise, before God and men, that you will examine, with the most scrupulous attention, the charges which will be brought against *N.*; that you will not betray, either the interests of the accused, or the interests of the society who accuse him; that you will hold communication with no one till after you have delivered your decision; that you will be swayed neither by hatred nor by malice—neither by fear nor by affection; that you will decide, according to the proofs which are exhibited in support, and in refutation, of the charge, conformably to your conscience and real conviction, with the impartiality, and with the firmness, which belong to a virtuous and free man.” Each of

the jurymen, called by name, holds up his hand, and answers,—
“ I do swear.”

This finished, the president then desires the accused to listen to the charge against him ; and the clerk of the court reads, with an audible voice, the sentence of the *Cour Imperial*, and the whole *acte d'accusation*. The president is then to explain the charge still more clearly, and to add—“ This is what you are accused of : you are about to hear what will be produced against you in proof of it.”

The *Procureur general*, the publick prosecutor, then states the matter of accusation. After this, he presents the list of all the witnesses that are to be examined at the instance of each of the parties. The names of the witnesses must have been notified to the party against whom they are to be produced, twenty-four hours before the time of hearing. The list thus presented is read aloud by the clerk ; after which the witnesses are placed in a chamber apart, and, if necessary, under precaution that they shall not converse together on the subject of the evidence they may have to give.

They are brought into court one by one, and an oath to the ordinary purport is administered to them. Their evidence is taken in the following manner. Each witness is interrogated as to his age, profession, &c. and as to his relationship to the accused, &c. He is then desired to state what he knows of the supposed offence, and, during his statement, must not be interrupted. After his statement is finished, questions may be put to him by the parties, through the mouth of the president ; and both parties are allowed to make *immediately* what observations, upon his evidence, they may think proper. The witnesses of the accuser are first heard, and then those of the defendant, who speak either to the fact or to the character of the accused.

The following is the list of the persons who, in each respective case, are held incompetent to be witnesses;—all relations in the direct line of ascent or descent; brothers, sisters; husband, wife, even after divorce; and informers, whose information is paid for by law. All these, however, may be examined, when the party, whose interest is concerned, does not object. Informers, whose information is not paid for, may be examined as witnesses; but the jury must be apprised of their quality of informers.

After examination, each witness may remain in court; but it is in the power of either party, or of the judge, to order any one or more of the witnesses to be placed apart, after being heard, and to be again examined separately, or confronted with one another.

The effects or articles which may be produced in supply of evidence, are presented to the court; and the parties are asked to offer their observations upon them.

If a witness appears to have given false testimony, the judge may order him to be committed: and if the evidence which the suspected witness has delivered is looked upon as material, the judge is empowered *ex officio*, or on the motion of either party, to remit the cause to the next session.

When the evidence has been gone through, the accuser is heard in support of the accusation. After this, the accused, or his counsel, make the defence. The accuser is allowed to answer. But the privilege of speaking last is, in all cases, reserved to the accused.

The accusation and defence of the parties being finished, it is the business of the president to sum up. He has to state concisely to the jury, the evidence which has been exhibited in support and in refutation of the charge; and to point out to them the duty which they have to perform. He then specifies the exact questions on which the jury are called upon to decide. The questions are as follows. 1st, Whether the accused has committed the crime specified in the *acte d'accusation*, with all the circumstances detailed in that instrument: 2d, If it appear from the evidence, that the crime, if committed at all, has been attended with different circumstances, the president shall add the following question:—"Has the accused committed the crime with such or such a circumstance?" 3d, When the accused has stated, in excuse, a fact which the law has recognised as a ground of excuse, the president shall ask, 'Is this fact true?' 4th, if the accused is under sixteen years of age, the judge shall put the question, 'Has the accused acted with discernment?'

The jury are then enclosed; furnished with the *acte d'accusation*, the *proces verbaux*, and all the other documents relative to the cause, excepting the written depositions of the witnesses. They are not allowed to quit their chamber till they have form-

ed their decision; nor must any one enter it, on any account, except by the permission, in writing, of the president.

When the jury have entered their chamber, the foreman, who is the jurymen whose name is first drawn out of the urn, or some one chosen with his consent by the jury, first of all reads to them the following instruction; which is fixed up, besides, in large characters, in the most conspicuous part of the jury-room.

‘The law requires not of jurymen an account of the means by which their conviction has been formed; it prescribes to them no rules on which they are to make the fulness or sufficiency of a proof rigorously to depend; it commands them to question maturely their own minds; and, in the sincerity of their conscience, to inquire what impression the evidence exhibited against the accused, and the evidence which he has been able to produce in his defence, have made upon their reason. The law does not say to them—*You shall regard as true every fact attested by such or such a number of witnesses:* it does not say to them—*You shall not regard as sufficiently established any proof, but such as shall be grounded on such or such proces verbal, such or such documents, such or such a number of witnesses, such or such a number of indicative circumstances:* it proposes to them only this single question, which comprehends the whole measure of their duties—*Have you a clear conviction?*’

‘What is highly essential to be kept steadily in view is, that the whole of the deliberation of the jury bears upon the *acte d'accusation*. The facts which it exhibits, or which depend upon it, are the matters of which solely it is their business to inquire; and they fulfil not their primary duty, when, looking to the infliction of the law, they are swayed by the consequences in regard to the accused, which may follow from the declaration they have to make. The trust with which they are vested, has for its objects neither the prosecution nor the punishment of crimes; they are called upon solely to determine whether the accused is guilty, or not guilty, of the crime laid to his charge.’

The jury are to deliberate, first, on the principal fact; and then on each of the circumstances. The decision of the majority is the decision of the jury; and, in case of equality, it is in favour of the accused. The votes are collected by the foreman. He puts to the jurymen, individually, the questions stated by the pre-

sident for their decision; and their answers are directed to be made in exact conformity to those questions.

When the decision is formed, the jury re-enter the court, and resume their places. The president asks what is the result of their deliberations; when the foreman rises, and, placing his hand upon his heart, says—*Upon my honour and conscience, before God and men, the declaration of the jury, is, Yes, THE ACCUSED IS GUILTY OF, &c. ; or, No, THE ACCUSED IS NOT GUILTY OF, &c.*

We have now gone through the two most interesting branches of the French system of criminal procedure; and should proceed to the last, which relates to the manner of enforcing and executing the sentences of the law. But we are wearied of the labour of abstracting; and must be indulged in a few observations upon what has been already delivered.

The first peculiarity that strikes us in this French system, is, that every part of the procedure is regulated by *precise written authority*: and this we cannot help regarding as a very considerable advantage. Nothing is of so much importance to a people, in regard to their laws, as that they should be indisputable, unvarying, and notorious. But the great use and advantage of writing is, that it imparts those qualities to whatever has been committed to it; and fixes a rule, admitting of no doubt, or variation, or concealment. When a man wishes to fix steadily even one of his own thoughts, and for the use of his own mind, he writes it down;—much more a thought which he wants to present steadily to the mind of any other person. How strange is it, then, that nations, far advanced in civilization, should allow any important part of their laws to remain unwritten! Yet such with exceptions almost incredibly small, is the account which is truly to be rendered of the practical state of law, not only as it has been, but as it now is, all over the world.

Not but that there are certain rules that, in the course of time, have acquired a technical notoriety, and a sort of traditionary authority. Without something of this sort, society could not have existed: But still the rules are not absolutely certain;—they are known only to practitioners in the law; and they may be violated or transgressed by rash or corrupt judges.

The utmost improvement which such a jurisprudence has been found capable of receiving, seems to be attained by making it a rule, that 'whatsoever had been done by preceding judges, should be done by succeeding ones;'—a rule that must always be liable to dispute, and must frequently admit of no application, where cases occurred under new or extraordinary circumstances.

If the judge does, what a man of a pure and vigorous mind, in such a situation, would naturally do; that is, endeavours, from a view of the particular cases all together, to draw up by analogy a rule *for his particular case*, he does exactly what it is the duty of the legislator, once for all, to do *for all cases*. It is the duty of the legislator, from a view of a sufficient number of well defined cases which have gone by, to draw up a *general rule*, which shall include all particular cases of the same description, that are to come. When the judge makes such a rule, the uncertainty remains exactly where it was before. When the legislator makes it, the uncertainty is put an end to for ever. What the judge does with his rule, is to decide by it a particular case: and all that remains, or can remain, of his doing, is the particular decision of a particular case; which as little resembles other particular cases, as those which have gone before it. What the legislator does, is to write down the general rule; and command, that according to it, shall be determined all future cases which fall within that general rule.

Another evil, because it is of enormous magnitude, must yet be mentioned, as springing from this unseemly state of the law. At whatever time the rule began to prevail, that the practice of preceding judges was to form the only standard for guiding the practice of succeeding ones;—however early the age—however weak, at that age, the human mind—however imperfect the law—the tendency of this rule was to prevent, for ever, the law from becoming better. And, in fact, it was in an early age—an ignorant and barbarous age—when the human mind was yet rude and imbecile, and law was in the highest degree inadequate to the purposes of law—that this rule began to prevail. Whatever, therefore, was the extent and force of its influence, from that time to this; to the whole of that extent it has operated, in making the wretched laws of a wretched age the rule of action for for all succeeding ages. When laws are not particular cases, but

general rules,—and when the legislator is the maker of them,—every age naturally enjoys the benefits of its own experience, and of the experience of all the ages which have gone before it. It is the business of the legislator to secure existing rights; but whatever improvements he can, from age to age, adopt, in the mode of securing those rights—whatever excellence he can bestow upon the distribution of those rights which are liable to accrue—is so much gained to the happiness of mankind.

The code before us is not only a written code, but it is written in the plain and ordinary words of the language; and is totally uninfected with that jargon of technical terms, the use of which constitutes, among us, to so great a degree, the art and science of the lawyer.

Of the two stages of judicial procedure, of which we have endeavoured to give an account, the first, viz. the preliminary procedure, taken in the most general point of view, suggests the following reflections, viz. That it seems well contrived to attain the ends of preliminary procedure; but that it attains them by a long, circuitous, and intricate path, when a short and direct one would have still better answered the purpose. A prosecutor to attend to every indication or suspicion of delinquency; and a judge to conduct the inquiry, and secure the suspected offender:—these important functionaries are absolutely necessary to attain the ends of the preliminary part of procedure. But these functionaries are perfectly competent to the attainment of them; and there seems no need for any other. This, however, is one of the peculiarities and defects (a very unhappy one) of the French character. The French hate simplicity: If an end can be attained by an easy but humble process, and by an operose but showy one, they are sure to prefer the latter. Besides the *Juge d'Instruction*, by whom every thing is done,—the offence inquired into, the evidence traced out, and the offender secured,—we have two other sets of judges—one rising above the other—between us and the judgment-seat. The proceedings of the *Juge d'Instruction* are reported to the *Chambre du Conseil*; the judges of which, if unanimous, may discharge the *inculpe*; if not unanimous, they must send him, with the reports of proceedings and documents, to the *Cour Imperial*, a section of which pronounces, whether the case is, or is not, fit for trial. It is only by

these stages, that the cause can be sent to the tribunal by which it is to be tried.

Both stages—both that of the *Chambre du Conseil* and that of the *Cour Imperial*—seem to us to be useless. Why should not the *Juge d'Instruction*, who has taken the evidence, and is the best acquainted with it, be allowed to determine whether the case is fit for trial or not? But at any rate, why have two other judicatories, one after another, for no other purpose but to make this determination? If the *Chambre du Conseil* is fit for it, why go any further? If it is not fit, why have recourse to it at all? Why not go immediately to the *Cour Imperial*?

The truth, however, is, that this *Cour Imperial* is the fruit of blind imitation. It is substituted to the *Jury d'Accusation*, established by the *Assemblée Legislative*, in imitation of the grand jury of England. The personages who reported upon the reasons and motives of the law, tell us, in the speeches printed in the same volume with the Code, that the *Jury d'Accusation* in France was attended with serious inconvenience. It was often impossible, it seems, to make the jurymen understand the difference between the sentence which merely put a man upon his trial, and the sentence which condemned him in its issue. They often, therefore, refused to find a sentence against the *inculpe*, when, though not clear that he ought to be punished, it was very clear that he ought to be tried. The *Cour Imperial*, with the *Chambre du Conseil* as a stepping stone to it, is now appointed to discharge the functions of the *Jury d'Accusation*. Whether the English grand jury was an institution of any use, or only one of the many relicks of antiquity which Englishmen worship out of mere superstition, the French legislators seem never to have thought it worth their while to inquire. The use of the English grand jury—the use of its finding an indictment, before a man suspected of a capital offence can be submitted to trial, was—that no one suspected merely of guilt should be subjected to the hardship of imprisonment at the discretion of an individual.*

* To save an innocent man from the hardship of a public trial, has been stated as an advantage of the grand jury;—but to an innocent man, who has been publicly accused, a public trial, if conducted in a mode as little onerous as it ought to be, is a blessing—not a hardship. In those rare cases, in which, for special reasons, secrecy is desirable, secrecy ought to be provided for by the law, when the trial is the principal one.

At a period when trials came round only once in seven years, and when the powers of law were wielded by fierce, impatient, and arbitrary barons, or the ministers of an arbitrary king, a security like this, against the dreadful hardship of imprisonment, of any length up to seven years, was of no light importance. Since the act of the 2d and 3d of Philip and Mary, which conferred upon justices of the peace the power of imprisoning before trial, the grand jury, which now sits only at the time when the court sits, at which the alleged offence may be tried, has evidently lost all power to save any man from the hardship of undue imprisonment; and seems really to serve no purpose whatsoever, but that of furnishing to actual delinquents an additional chance of escape. The court appointed to try the man in the best mode, is ready to try him. Then, why try him twice; first in a bad and insufficient way, and only after that, in the good and final way?

A grand jury must do one of two things: it must send a man to trial, or discharge him: it must find the bill *a true bill*, as the lawyers term it, or the contrary. In all cases in which it sends the man to his trial, it does neither good nor evil; for the man is tried, and sustains the consequences of his trial, exactly as if no such thing as a grand jury had been in existence. In the cases in which the grand jury discharge, the man must be either innocent or guilty: if innocent, the grand jury is useless again; for, immediately, or in a short space, the man would have received the same discharge from the court that would have tried him. The only case, therefore, in which a grand jury can do any thing which would not be done without it, is the case in which it discharges a man really guilty, whose guilt would have been ascertained by the court. There is only one case, then, in which it can be any thing but useless,—and that is a case in which it is purely mischievous.

The same reasoning applies, and with equal force, bating a very trifling exception, to the *Chambre du conseil* and the *Cour Imperial* of the French. As these judicatories act as often as there are cases for them to act upon, and not solely at the time when the *Cour d'assises*, which sits necessarily only once in three months, is acting, it may happen to them to free a man, whose innocence is clear, from the hardship of nearly three

months' imprisonment. To this extent they have a use which our grand jury no longer has. But at the same time, is it not pretty evident, that this service, such as it is, might be rendered by the *Juge d'Instruction*, who, having collected the evidence, and being of all men the best acquainted with it, might surely determine whether it is such as to render a trial necessary? But still further, why leave it possible for a man, who is committed for an offence, to remain three months, or even three weeks, without trial? If you can afford to have two distinct judicatories always ready to try him in the bad mode, why not have one always ready to try him in the best mode?

We are disposed to go yet a step further—We have already expressed our sense of the high importance of the functions discharged by the judge who takes the preliminary investigation, and receives the evidence in its first and freshest shape. This is a duty of so high a nature, that we are sure it cannot be safely trusted to any hands which are not worthy to be trusted with the duties of the trial itself. We are equally sure that the information which is acquired by the man who has taken the evidence in its first and freshest shape, and which is peculiar to him who has taken it in that shape, is, in many instances, of so much importance, that every other man's knowledge of the subject must, in comparison of his, be extremely imperfect. There seems, therefore, a manifest propriety, and inestimable advantages, in rendering the judge who makes the preliminary, and the judge who makes the final investigation, the same person.

We should thus clear away a vast proportion of the grand apparatus and machinery of the French system. But our simple machinery would do the work a great deal more perfectly. We should get rid, not only of our *Chambre du conseil* and *Cour Impériale*, but even of our *Juge d'Instruction*, and of all our *Juges d'Assises*, except one, in whose person we should combine the functions, both of *Juge d'Instruction* and *Juge d'Assises*. Formerly, the French counted their judges in each tribunal by scores; and imagined, that the more they multiplied them, the more they multiplied the chances of good judgment. This fancy seems now pretty much on the wane,—since no more than five is the number of judges here assigned to constitute each *Cour d'Assises*; but still, the security to be derived from numbers seems to

be reckoned as something; and the vast importance of that powerful principal, *individual responsibility*, and its application, both to the administration of law, and to the science and art of government to be very imperfectly comprehended.

In the comparison, however, which the present case affords between the French and ourselves, this much we are bound to confess, that the complicated apparatus of the French is so contrived, as to perform, in the long-run, the preliminary business of penal judicature to a high degree of perfection; while, with us, with a machinery by no means void of complication, this preliminary business is very badly performed. The three parts of the preliminary business of penal judicature, as we have already seen, are, 1. To secure early and certain notice of offences; 2. To secure the person, or property, or or both, as the case may require, of the offender; and, 3. To search out and secure, for the tribunal, the evidence of his guilt.

1. In regard to the first of these objects, which is of so much importance that it is the foundation of all the rest, *no provision* whatsoever is made in English procedure. There is no publick prosecutor, nor functionary of any description, who is called upon to take immediate notice of ordinary crimes; with the single exception of the coroner, in the single case of violent death. In all other cases, we trust entirely to the information of the individual whom the crime has injured. For want of a prosecutor, we bind this voluntary informer to prosecute; which is imposing upon him so great a burthen, in loss of money, loss of time, and in trouble of various kinds, that, in a great proportion of instances—in probably by far the majority of instances—where the injury is not of an atrocious sort, the injured person conceals it, and withholds complaint. Instead of taking measures to secure the notice of crimes, we thus take measures to secure their concealment. The reward of 40*l.* upon conviction, in the case of a few felonies, but palliates the evil; and a most feeble palliation it is.

2. As to securing the person and property of the offender, in those cases of offence which happen to find a pursuer,—which happen to find some one either angry enough, or publick spirited enough, to charge with them a justice of the peace, his powers to secure the person of the offender are upon a par with those of the functionaries appointed by the French; excepting, and it is

a pretty important exception, that the French enactments on the subject of bail are very clear and precise, while our unwritten law on this subject is very much the contrary. In regard to the securing for *justiciabilité*, as the French call it, the property of the offender, the regulations of the French and English seem to be equally, and both to a miserable degree, defective. 3. The third object of the preliminary part of penal procedure—the searching out and securing the sources of evidence, a point of such cardinal importance for the execution of the laws, is very fully provided for, by the French law, while hardly any provision for it whatsoever is made by the English. In France, infinite pains are taken that every thing should be explored. In England, no pains whatever are taken that any thing should be explored. The justice of the peace, if the offender is brought before him, and not otherwise, is bound to examine him; if the witness is brought before him, and not otherwise, he is bound to examine him. The evidence which voluntarily presents itself, is all that any judicial functionary in England is under any obligation to attend to. The police-officers recently established in London and Middlesex, to the great benefit of the community, are in the habit of volunteering their services, in the preliminary investigation of crimes; though in reality beyond their sphere, and often without legal powers. This, too, is only for London and Middlesex; what becomes of the rest of the country?

In regard to the constitution of the *Cour d'Assises*, the people of France are entitled to boast, that they have, in every limited district, one such court *stationary* among them, bound to sit once in every three months, and, if need be, oftener, and to sit as long as there is any business for it to perform: while the people of England have to lament that they have no such court. They have an itinerant court that comes into some counties once in six months; into others only once in twelve months; and sits in each place only a very limited number of days, how great soever the quantity of business which it may happen to have to perform. The French, however, would have done still better, and to an extraordinary degree, if, instead of sitting once in three months, they had ordained their courts to sit always, and to be every day in readiness to dispense the justice for which the people may have occasion.

It is a curious circumstance, that the people of England should look upon the institution of jury-trial as an indispensable, and nearly an all-sufficient safeguard against absolute power; and that Bonaparte should manifest great solicitude to bestow jury-trial, in penal cases, upon the people of France. The discourses of the orators who introduced the code, and who take pains to remove objections to this mode of trial, show that it is not popular in that country: and it really appears to be a hobby-horse of the emperour.

This is a subject worthy of more reflections than we have now time to bestow on it. Is a jury, in its best state, the best possible instrument of judicature? We have already, on various occasions, frankly acknowledged, that our estimate of its utility is very far indeed from rising so high as that of a very great proportion of our countrymen. But this is a controversy, into which, at present, it is altogether out of our power to enter.

From the experience which is said to have been obtained, that the lowest order of the people in France are incompetent to the duties of jurymen, measures have been taken to prevent the election of jurymen from descending so low. Every jury, in France, is thus what we should call a special jury. In adopting those measures, no care, as was to be expected, has been taken to prevent the choice of such persons for jurymen as are specially dependent upon the government; but neither does it seem to have been in any degree a study to secure the choice of such persons.

The prefect, indeed, makes up the list of sixty, out of which the jury is to be chosen, and may thus be supposed to possess the power of packing. The same power, however, is possessed by our sheriffs; and it is only in so far as his situation is a more dependent one than theirs, that the power in his hands can be more dangerous. In regard to all causes between the king and the people, the set of causes in which, if in any it must be of importance, that he who forms the list of jurymen, should not be a dependent, either mediately or immediately, of the government; in all special jury-trials; and, in particular, in the most important by far of all special jury-trials, trials for political libels; trials on which the liberty of the press, the publicity of the acts of government—and, along with it, every security for

good government essentially depends—the situation of the personage who, in England, forms the jury-list, the master of the crown-office, is, to the full, as dependent a situation as it is possible for that of Bonaparte's prefect to be. Whatever the danger then, to the people of France, from *packed* juries; it is, to say the worst of it, no greater than that to which we, our privileged selves, are exposed.

In the mode of commencing the trial, the French procedure appears to us, in point of dignity and propriety, to be considerably superior to our own. In the French forms, there seems nothing but what is useful. In ours, there are many things that are unmeaning and offensive. In France, the prisoner is brought into court, and solemnly desired to attend to the accusation against him, while it is read; and to the evidence in support of it, while it is produced. No questions are asked of him, much less absurd ones, where no questions can be of any use. The prisoner, in England, is asked, if he is guilty or not guilty? To what purpose? To one very visible purpose at least—to add the guilt of a judicial falsehood, *i. e.* of perjury, to that of whatever other crime the party, if guilty, may be charged with. Is it to extort a confession from him, in such a moment of embarrassment and terror?—No: for the judges, aware of the cruelty of that, use their strenuous endeavours, on almost all occasions, to prevent the prisoner from pleading *guilty*; that is, to induce him, as often as he is really guilty, to pronounce a solemn and judicial falsehood. What possible good is there in this? There is liable to be great cruelty in it; as often as a really conscientious man, but guilty of the offence laid to his charge, is brought to trial. Not only is the absurd, or cruel answer of *guilty* or *not guilty*, extorted from the prisoner; another, in point of naked absurdity, rising, if possible, still higher in the scale, is forced upon him. He is asked in what way he will be tried; though there is but *one* way in which he *can* be tried; though there is but *one* answer which the court will permit him to make; though there is but one answer, to the exclusion of all others, which it will compel him, and may, by torture—the most dreadful kind of torture (*peine forte et dure*,) to make. Such is the procedure at common law. It may be proper to add, that, in modern practice, it is not by the *peine forte et dure*, which modern feelings would

not tolerate, but by the pain of condemnation without trial, that a man is, in fact, compelled to answer those far worse than useless questions. At the time when we may conceive the question to have been first proposed, and for long after, a use for it, such as it was, really existed. There really were more modes of trial than one, among which the man was asked, and had a right to make his choice. He was asked how he would be tried; and he might have answered—by battle—by ordeal; and so on—or, by his country. After the trials by battle, by ordeal, and so on, have ceased to exist, and no trial but that by the country remains, the culprit is *still* asked, as if he had a choice, in what manner he will be tried. Why?—For this truly English, and truly curious reason—that once, a long time ago, when there was some use for the question, it was the custom to ask it. We should laugh heartily at reading the account of such rational ceremonies in the juridical procedure of the Hindus or Chinese. The ceremonies in question, however, are our own ceremonies; and that makes all the difference in the world.

In taking cognizance of the evidence, there is one particular in which the English mode of procedure has greatly the superiority over the French. In France, all questions put to the witness by parties are first delivered to the president, and by him asked of the witness. Much, by this plan, is lost, of the extractive force and efficacy which belongs to the English mode of cross-examining. By first stating the question to the president, the witness is put upon his guard, and has the whole time, during which it is repeated, to meditate a false or evasive answer. This is so well understood at the English bar, that, as often as a *mala fide* witness, for the purpose of gaining time, demands a question to be repeated, a skilful interrogator immediately puts—not the same question, but another; and leaves the former till he can put it again, when his respondent is once more off his guard.

In regard to the instances in which the French have thought proper to shut out the light of evidence, by declaring, that such and such classes of persons are not admissible as witnesses, it would require a more minute comparison than can at present be made, to say whether the French or the English have made the largest election of evil. To say of either the French or the English rule of exclusion, that it is inconsistent with itself, is to say nothing; for all exclusion is inconsistent with itself. The same

reasons which exclude one class of persons, would be good for excluding so many more, that if they were consistently acted upon, there would seldom be evidence left behind, sufficient, on which to establish any judicial point.

In a very rude period of society, men think of estimating evidence by none but mechanical rules. Number alone decides the question. A certain number is fixed upon. If the fact is sworn to by that number of witnesses,* it is to be held proved; if not sworn to by that number, it is to be held not proved. While this rule continues to be rigidly obeyed, one can see a reason why a man, who may be strongly suspected of an intention to give false evidence, should not be heard; since his evidence must, if admitted, be of equal force with that of the man who is ever so likely to speak the truth. But, after the time when the judge is free, and accustomed to weigh the evidence which any man delivers; and to yield it credence in any proportion, or no credence at all, just as he may esteem it to deserve; it is not easy to see any good reason why any man should be refused to be heard. The truth is, that the rule of exclusion is a rule adopted, as we have seen, in the rude state of society to which we have just alluded, and with a blind simplicity followed, in a state of the human mind to which it is altogether alien.

The persons excluded by the usual rules of incompetence, are the persons by whom, naturally, most is known of the subject of inquiry;—the parties, or those most strongly connected with them by sympathy or interest. The question is, whether, to receive the most valuable knowledge, blended with error, is best for a court of justice; or to give up the knowledge, that it may at the same time be free from the error? To determine this question, we have only to look how far it goes. Courts, upon these terms, have only to exclude all knowledge, to make sure of excluding all error; and to deliver infallible decisions by the strength of taking no evidence. In the business of ordinary life, the rule which guides men to prudent conduct is different.—When deeply concerned to obtain accurate knowledge, they overlook no quarter, pure or impure, in which it is likely to be found. Never do they turn away from the man whom they know to be the most capable to instruct them, because he may have an interest in not telling them the truth. They only question him so

* See the Old Laws as to *Compurgatores*, and *Wager of Law*, &c.

much the closer. They never doubt, that if they can get but knowledge enough, however blended with error, the knowledge will afford them light of its own by which to separate it from the error. It is not when information is abundant, but when it is scanty, that it is difficult or impossible to distinguish truth from falsehood. It has been the happiness, however, of the human race, that the business of judicature has to so great an extent been hitherto conducted upon principles directly repugnant to those which experience has established as the rules of wisdom in every other department of human action.

We had many more observations to offer ; but it is absolutely necessary that we should come to a conclusion. One word, however, must be added upon a point which would require a multitude,—the formation, by the president, of the questions to be decided by the jury, when the evidence has been fully heard. Nothing in the least degree similar to this is known in our practice. By the English rules of *pleading*, as it is called ; that is, by compelling the allegation on the part of the accuser to be met with a counter allegation on the part of the defendant, the question for the jury is made up, *before* the hearing of the evidence begins. When a crime has been committed, there are three distinguishable cases to which it is material to attend. 1. The crime may have been committed simply. 2. It may have been committed with circumstances of aggravation. 3. It may have been committed with circumstances of extenuation. These circumstances, it belongs to the law, to define and make provision for. The questions framed for the jury by the French legislators, are respectively adapted to these three cases ; and point them out, with precision, to their attention. The English have only one vague, general question, by which they are all blended and confounded together. *Guilty*, or *Not guilty*, admits no consideration of circumstances ; circumstances are not submitted to the cognizance an English jury ; and, in truth, are but little the object of English judicature at all. The judge, indeed, may sometimes take them into consideration in his sentence, but, in most cases, he can do nothing ; and, at all events, it is infinitely desirable that every thing which ought to be done in a criminal prosecution, should be positively enjoined by the law.

No. XVI.

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The advantages of decision by the majority of a jury, as compared with unanimity, would require, and would repay a very full elucidation. But this we must at all events postpone till another opportunity: and, in the mean time, we cannot do better than refer such of our readers as really take an interest in such discussions, to the writings of Mr. Bentham, who, with all his dogmatism and irreverence for existing institutions, has treated the whole subject of legislation with a spirit, a precision, and a profundity, which entitle all his suggestions to the most deliberate and respectful consideration.— *Edin. Review.*]

SUPERIOR COURT. NORTH CAROLINA.

BERTIE COUNTY, APRIL TERM, 1844.

Joseph Blount v. John Chester.

THIS was an action on the case to recover damages for a deceit in the sale of a horse. The plaintiff bought the horse in question from the defendant in October 1807, for the sum of one hundred and twenty-eight dollars. Soon after in riding him from Windsor to Newbern, the horse became perfectly blind. It appeared in the evidence that the defendant had purchased the horse about twelve months before he sold him. His eyes were at that time defective. The defendant applied a remedy which produced a temporary relief. But whenever the horse was rode a journey the disorder returned. The defendant in bringing him from Tennessee, had discovered he was getting blind, and was obliged to drive very moderately to prevent the loss of his eye-sight. The plaintiff purchased without being apprised of this defect. The defendant had refused to warrant, saying he had determined never to do so, as he had already been injured by warranting his horses. He observed while exposing his horse to sale, that the eyes of some *looked dull*, but this was occasioned by their having travelled over dusty roads. He afterwards ac-

knowned, that he knew the horse was subject to blindness, but thought he was not answerable as he had not warranted. The horse after he became blind was sold for sixty dollars. This was the evidence on the part of the plaintiff.

The defendant endeavoured, but unsuccessfully, to prove that the horse, after he came to the plaintiff's possession had received some injury, by which the blindness might have been occasioned.

After arguments by counsel, his honour Judge Hall observed, that this was an action to recover damages for deceit in the sale of a horse. The ground of this action were that the property sold was defective, that this defect was known to the seller and unknown to the purchaser. If the jury believed, that the plaintiff *did* know of the defect at the time he bought the horse, he could not complain. He had sustained no injury from the defendant. It was his own folly. But it was for the jury to decide whether he did or did not know it. It was not because he might possibly have known it, that the defendant was to be discharged. If indeed, the defect was so open and visible that he could not well avoid discovering it, then the jury must of course presume against him. In the present case, skill might have been required. The plaintiff might not have been possessed of this skill. If in fact, he was ignorant of the circumstance, though a person better acquainted with horses might have discovered it, the deceit and criminality in the defendant were still the same. He was imposing on the plaintiff as sound, what he knew to be unsound. He was not acting with that fairness and plain dealing which became an honest man. Again, it had been said, the plaintiff placed no confidence in the defendant—he saw the horse examined, and liked him; why was the defendant bound to disclose the defects of the property, which it was his interest to sell to the best advantage? He was bound by the rules of good faith and honesty. He was bound as a man of truth, of candour and of fair dealing. It is a principle in morals as well as a maxim in the municipal law, that a *suppression of truth, is often equal to a suggestion of falsehood*; a deception may be as effectually occasioned by the one as the other. Men must place some confidence in one another or there must be an end to civil intercourse. The confidence reposed by the plaintiff in the de-

pendant in the present case, necessarily arose from the nature of the transaction. It was not an unreasonable one.—The courts of that country, from which we derive our laws, have lately gone a great way in enforcing moral obligations, and I trust we shall go at least as far. In a recent case decided in England, A. had sold a vessel to B who agreed to take her *just as she stood*. It appeared afterwards that some of her timbers were unsound; that this was known to A. but could not have been known to B. when he purchased. The court determined that A. ought in justice and honesty, to have disclosed this defect, and as he had not done so should be liable to B. in damages. Many persons in this country have considered themselves loosed from the obligations of morality, when they were trading in horses. It is time to correct this false notion. If the jury believe the evidence in the present case, and that the plaintiff knew not the unsoundness of the horse, at the time he purchased, they will give ample and exemplary damages.

The jury retired, and in a short time returned with a verdict for 60*l.* 10*s.* for which judgment was entered.

OPINION

Of the Attorney General of the United States on the case of General Wilkinson.

Washington, January 9, 1809.

SIR,—The case referred to me for my opinion, as stated in your note of the 6th instant, is not free from difficulty. At first view, it presented serious embarrassment. On mature reflection, however, I concur in the opinion you have formed.

The 4th section of the act of March 16th, 1802, declares "that the monthly pay of the officers, non-commissioned officers, musicians and privates be as follows, viz.—To the brigadier-general two hundred and twenty five dollars, which shall be his full and entire compensation, without a right to demand or receive

any rations, forage, travelling-expenses, or other perquisite or emolument whatsoever." Those expressions are broad and comprehensive, and if taken alone would exclude the allowances granted. But to put a just interpretation on any clause contained in a statute, you must look beyond the isolated section. The entire act must be taken into view, and such a construction formed as will give effect to every part.

Though in relation to other commissioned officers, this section provides only for their pay, yet in the case of the brigadier-general, it fixes a certain sum as his full and entire compensation, for pay, rations, forage, travelling-expenses, and any other perquisite or emolument, to which, by virtue of his office, and in his capacity of brigadier-general, he may be entitled. The terms "perquisite and emolument" are well understood. A perquisite means something gained by a place or office, over and above its settled wages. An emolument is an advantage or profit arising from the particular office held.

The scale assumed by Congress, when they fixed the monthly pay of the brigadier-general at two hundred and twenty-five dollars, as a full and entire compensation, included no doubt a just estimate of the usual allowance, for rations, forage and travelling-expenses, to an officer of that grade. If this section established only his monthly pay, and, as in the case of the commissioned officers, the act has positively fixed and ascertained, in subsequent sections, the allowance for rations, forage, &c. it would have amounted, I apprehend, to the same thing as it does at present. Those officers for whose pay, rations, &c. provision is made in this manner, are, I conceive, as completely excluded, thereby, in their respective capacities, considered merely as officers of a certain grade in the ordinary line of duty, from additional compensation in any shape, as the brigadier-general, in his distinct and substantive quality as such, by the expressions in relation to his monthly pay, being full and entire compensation. When a statute declares positively that an officer shall receive a certain pay, and a precise number of rations, &c. the affirmative expressions imply and import a negative, that he shall not receive any more than what is thus limited and prescribed. The law thus fixes his full and entire compensation, by specifying particularly every article of which it shall consist.

Notwithstanding this, it will be conceded that officers are entitled to quarters and fuel, in proportion to their rank when the army goes into winter-quarters; or to tents when encamped. When marching by land with the army, or proceeding by water, the wagons or vessels proper for transporting their necessary baggage or camp-furniture, would be provided at the publick expense and would not be deducted from their compensation. This I believe to be the universal usage and custom.

The allowance made to General Wilkinson is not in the capacity of brigadier-general, but in his quality of a commander of a separate post. By the 5th section of the act above mentioned, the President is authorized to allow to the commander of separate posts, such number of rations as he may from time to time think proper to direct, having respect to the special circumstances of each post. Officers of different grades may be ordered by the President, as commander-in-chief, to different posts:—the brigadier general as well as a colonel, or other inferior officer. Now the importance of a particular post, may point him out to the President, as the most suitable person. He is obliged, when ordered, to repair to the place; a situation, perhaps the least desirable. His command is limited to the defence and protection of the post assigned. I can perceive no solid distinction in reason, or common sense between his case, and that of any other officer. They are equally subject to the superior control of the commander-in-chief, and must obey when he orders. The births may not be of their own seeking. In this new capacity or peculiar office, Congress have thought proper to vest in the President a discretion on the subject of rations. By virtue of this power, the President, through you as his regular organ, has thought proper to allow General Wilkinson, “whilst commanding at New Orleans, treble rations.” In doing this, I understand he has followed the example set in similar cases, and particularly the precedent in the instance of Colonel Freeman, who commanded at the same post. Upon the best consideration, I have been enabled to give the case, I believe the practice to be correct and legal.

Yours very respectfully,

C. A. RODNEY.

(Signed)

The Secretary at War.

PRIVILEGE.—LIBEL.

LANCASTER ASSIZES.

The King upon the prosecution of Robert Kirkpatrick, Esq. *vs.* Thomas Creevey, Esq. M. P.

Mr. Park, the attorney-general for the county, stated that this was a prosecution against Mr. Creevey, a member of Parliament, for having published in the *Liverpool Mercury*, a most scandalous and defamatory libel, highly injurious to the character of a gentleman of the name of Kirkpatrick, filling the important office of inspector-general of taxes. He did not mean to deny the honourable member's right to state what he pleased in the House of Commons—the exercise of that privilege, however, it might affect the feelings of individuals, could not be called in question; but he contended, that if a member of the House of Commons afterwards sent to the editor of a newspaper his own report of his speech, he was answerable, if it contained libellous matter, just the same as of the publication of a libel of any other description. The learned counsel then stated, that the libel purported to be the report of the honourable member's speech, made upon the occasion of presenting the petition to the House of Commons, against the East India Company's monopoly. He seemed to have gone wholly out of his way, in order to vilify the prosecutor, for he represented the distress of the people of Liverpool, as having been aggravated by his appointment to the office of inspector-general of taxes. He designated the office of Mr. Kirkpatrick, as that of a common informer, and insinuated that he received a large annuity, for undertaking to screw up persons' assessments to the extent of his own imagination. The learned counsel added, that the libel went on to insult the memory of the late Mr. Perceval, by asserting that he had given Mr. Kirkpatrick

this appointment, merely in consequence of having been his client. The learned counsel then referred to the case of the *King vs. Lord Abington*, to show that the publication of a libel against an individual was not to be justified by the circumstance of its being the report of a speech made in Parliament. He concluded by expressing his conviction that the verdict would confirm the doctrine for which he contended.

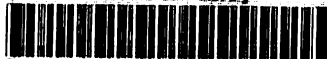
The publication from Mr. Creevey's manuscript having been clearly proved ;

Mr. Brougham first submitted to his lordship, upon the authority of the case of the *King vs. Wright*, that he was not called upon to address the jury. He insisted, generally, that a member of Parliament could not be held accountable for publishing a true report of what passed in Parliament.

Sir Simon Le Blanc over-ruled this point ; and the learned gentleman then addressed the jury. He said, that Mr. Creevey had been urged by many members of both houses, justly alarmed at this prosecution, to insist upon his privilege ; but the learned judge having decided against him, he should now proceed to the other ground of his defence. He then, in a very eloquent and ingenious speech, contended that there was nothing libellous in the publication ; that matters reflecting in a much higher degree upon the characters of individuals had been published, as the speeches of Mr. Burke, Mr. Pitt, Mr. Windham, and other eminent Parliamentary characters. He inferred the injurious operation of imposing any restraint upon the publication of reports of what passed in Parliament, and on this ground principally trusted his client would be acquitted.

Sir Simon Le Blanc, stated his clear opinion, that it was no extenuation of a libel, to say that it was the report of a speech in Parliament ; the publication in question was one which tended to vilify the prosecutor, who was in the execution of a publick duty, and he was therefore bound to say, it was a libel, answering the description given of it in the indictment. The jury were of the same opinion, and without hesitancy, pronounced a verdict of GUILTY.

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